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No. 08-

In The
Supreme Court of the United States

JOSEPH J. FILEBARK, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION and FEDERAL AVIATION ADMINISTRATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Civil Service Reform Act of 1978 regulates adverse personnel actions, i.e. official actions that unfavorably alter the employment, classification or salary of federal employees. The Act provides a comprehensive set of remedies for such adverse personnel actions, including in specified circumstances review by the Merit Systems Protection Board and judicial review of the action of the Board. In *United States v. Fausto*, 484 U.S. 439 (1988), this Court held that the Act precludes judicial review of such adverse personnel actions under the Back Pay Act.

The Question Presented is: Does the Civil Service Reform Act, as the District of Columbia Circuit held, preclude judicial review under statutes other than the Civil Service Reform Act itself of "federal employee claims" generally, including claims that are neither adverse personnel actions nor otherwise covered by the Act?*

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* A certiorari petition raising the same question presented is pending in *Grosdidier v. Chairman, Broadcasting Board of Governors*, No. 08-___.

PARTIES

The petitioners are Joseph J. Filebark, II, Jerry Todd, Sr., John J. Havens, II, and Richard Boatman. The respondents are the United States Department of Transportation and the Federal Aviation Administration.

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Petitioners Joseph Filebark, *et al.*, respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on February 13, 2009.

OPINIONS BELOW

The February 13, 2009 opinion of the Court of Appeals for the District of Columbia, which is reported at 558 F.3d 1009 (D.C.Cir. 2009), is set out at pp. 1a-13a of the Appendix. The March 31, 2008 opinion of the District Court for the District of Columbia, which is reported at 542 F.Supp.2d 1 (D.D.C. 2008), is set out at pp. 25a-43a of the Appendix. The February 27, 2006 opinion of the District Court for the District of Columbia, which is reported at 468 F.Supp.2d 3 (D.D.C. 2006), is set out at pp. 14a-24a of the Appendix. The October 5, 2004, opinion of the Court of Appeals for the Federal Circuit, which is reported at 386 F.3d 1091 (Fed. Cir. 2004), is set out at pp. 56a-64a of the Appendix. The May 5, 2003 opinion of the Court of Federal Claims, which is reported at 56 Fed.Cl. 449 (2003), is set out at pp. 44a-55a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on February 13, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Administrative Procedure Act

Section 702 of Title 5 provides in pertinent part "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Section 704 of Title 5 provides in pertinent part "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in court are subject to judicial review."

Section 706 of Title 5 provides in pertinent part: "The reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or not in accordance with law...."

Civil Service Reform Act

Section 7512 of Title 5 provides in pertinent part:

This subchapter applies to –

(1) removal;
(2) a suspension for more than 14 days;
(3) a reduction in grade;
(4) a reduction in pay; and
(5) a furlough of 30 days or less ...

Section 7513 of Title 5 provides in pertinent part:

> (a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.
>
> * * *
>
> (d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

Section 7701(a) of Title 5 provides in pertinent part: "An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation."

Section 7703(a) of Title 5 provides in pertinent part: "Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision."

Section 7703(b)(1) of Title 5 provides in pertinent part that "[e]xcept as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit."

Federal Aviation Administration Personnel System

Section 40122(g)(1) of Title 49 provides in pertinent part:

> [N]otwithstanding the provisions of title 5 and other Federal personnel laws, the Administrator shall develop and implement, no later than January 1, 1996, a personnel management system for the Administration that addresses the unique demands of the agency's workforce. Such a new system shall, at a minimum, provide for greater flexibility in the hiring, training, compensation, and location of personnel.

Section 40122(g)(2) of Title 49 provides in pertinent part:

> **Application of title 5** – the provisions of title 5 shall not apply to the new personnel management system developed and implemented pursuant to paragraph (1), with the exception of –
>
> (A) section 2302(b), relating to whistleblower protection....;
>
> * * *
>
> (C) chapter 71, relation to labor-management relations;
>
> * * *
>
> (H) sections 1204, 1211-18, 1221, and 7701-7703 relating to the Merit Systems Protection Board.

Section 40122(g)(3) of Title 49 provides:

> **Appeals to Merit Systems Protection Board.** – Under the new personnel management system developed and implemented under paragraph (1), an employee of the Administration may submit an appeal to the Merit Systems Protection Board and may seek judicial review of any resulting final orders or decisions of the Board from any action that was appealable to the Board under any law, rule, or regulation as of March 31, 1996.

STATEMENT OF THE CASE

The Statutory Scheme

The Civil Service Reform Act of 1978 ("CSRA") codified and reorganized a number of important substantive and procedural rights of federal employees. Chapter 75 deals with adverse personnel actions taken against employees "for the efficiency of the service." Section 7513 establishes certain procedures which an agency must follow in taking a major adverse personnel action, such as a dismissal or reduction in pay. Section 7513(d) provides that any employee against whom such an action is taken may appeal to the Merit Systems Protection Board established under Chapter 12. Section 7703 authorizes judicial review of actions by the Board.

Chapter 23 of the CSRA establishes a number of prohibited personnel practices. Employees aggrieved by asserted violations of those prohibitions may seek redress from the Office of Special Counsel, established under Chapter 12. Section 1222 of Title 5 provides that "[e]xcept [with regard to certain whistleblower claims], nothing in this chapter or chapter 23 shall be construed to limit any right or remedy available under a provision of statute which is outside of both this chapter and chapter 23."

Chapter 71 of the CSRA regulates labor relations at federal agencies, and requires that any collective bargaining agreement shall provide procedures for the settlement of grievances arising under that agreement. Those grievance procedures of a collective bargaining agreement ordinarily are "the exclusive administrative procedures for resolving grievances which fall within its coverage." 5 U.S.C. § 7121(a).

The Federal Aviation Administration is expressly subject to the provisions of the CSRA regarding appeals to the MSPB and judicial review of Board actions. The labor relations provisions of Chapter 71 also apply to the FAA. On the other hand, most of the provisions of Chapter 23 regarding prohibited personnel practices do not apply to the FAA, and in dealing with major adverse personnel actions the FAA is free to frame its own internal procedures. 49 U.S.C. § 40122(g).

Proceedings Below

This case concerns the salary levels paid to employees at the FAA Albuquerque air traffic control facility. Salary levels for controllers and their supervisors are governed by the classification given to the particular facility at which they work. That classification is based to a substantial degree on the amount of air traffic which the facility must handle. Air traffic controllers at facilities that handle a higher volume of traffic are paid more. This salary and classification system is embodied both in a collective bargaining agreement between the FAA and the National Air Traffic Controller Association ("NATCA") and in a separate order issued by the FAA that governs the salaries of supervisors who are not covered by the collective bargaining agreement. (Pet. App. 16a-17a and note 2, 28a-30a). The Albuquerque Center is now classified at an air traffic control ("ATC") Level 10. The plaintiffs (both union and non-union controllers) seek to have the Center reclassified as an ATC Level 11, which would result in a significant increase in salary for unionized and non-union workers alike.

Plaintiffs made repeated but unsuccessful efforts to pursue administratively their contention that the Albuquerque Center was misclassified. Filebark and another plaintiff[1] who were union members initially filed a grievance under the collective bargaining agreement, asserting that the Center's classification

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[1] Filebark and Havens.

violated that agreement, and filed an unfair labor practice charge based on that asserted violation. The union subsequently filed a grievance of its own, and then asked that the grievance and charge filed earlier by the two individual controllers be dismissed in light of that union grievance. Once the grievance and charge of the two controllers had been dismissed as requested, however, the union withdrew its own grievance and refused to ask that the matter be sent to arbitration. (Pet. App. 16a-17a).

The efforts of the controller supervisors were equally unavailing. Under the FAA administrative procedures, only the Albuquerque Center's Facility Manager was authorized to file an appeal of the FAA's classification decision. Petitioner Todd, one of the controller supervisors, sought without success to persuade the Facility Manager to file such an appeal. Undeterred, Todd also tried to lodge a complaint with the Merit Systems Protection Board, but the Board declined to accept his complaint. (Pet. App. 32a).

Following the action of the Board, a group of controllers including several of the plaintiffs filed suit in the Court of Federal Claims under the Tucker Act, seeking backpay based on the salaries they would have received if the Albuquerque Center had been reclassified. The Court of Federal Claims dismissed that action, and the Federal Circuit affirmed. (Pet. App. 44a-64a). The Federal Circuit reasoned that the plaintiffs, even if successful on the merits of their claims, would be entitled only to prospective injunctive relief; the Tucker Act, on the other hand,

authorizes only retrospective awards. (Pet. App. 61a-62a).

Finally, the plaintiffs filed the instant case in the District Court for the District of Columbia. The complaint asserted that the failure of the FAA to comply with its own facility classification standard was arbitrary and capricious, and sought relief under the Administrative Procedure Act. The complaint sought only prospective injunctive relief requiring the FAA to upgrade the classification of the Albuquerque Center.

In its 2006 decision, the District Court dismissed the claims of the union plaintiffs, holding that the CSRA precluded union members from filing suit with regard to any matter that could be the basis of a grievance under the collective bargaining agreement. (Pet. App. 18a-20a). The District Court acknowledged that its construction of the CSRA, particularly of the significance of section 7121(a), had been rejected by the Federal and Eleventh Circuits. (Pet. App. 19a-20a).

In 2008 the District Court dismissed the claims of the non-union controllers. The CSRA, the district judge held, precluded any civil action related to federal employment except those forms of judicial review expressly authorized by the CSRA itself. (Pet. App. 39a-43a).

The District of Columbia Circuit affirmed. The CSRA, it insisted, precluded the federal courts from considering any claim arising out of federal employment except in those specific instances in which the CSRA itself permitted such judicial review. That

general rule of preclusion, the court of appeals held, barred the claims of both the union and non-union plaintiffs. The circuit court therefore found it unnecessary to decide whether the claims of the union plaintiffs would also have been barred by section 7121(a). (Pet. App. 6a-7a).

REASONS FOR GRANTING THE WRIT

I. There Is A Well Established Inter-Circuit Conflict Regarding Whether The Civil Service Reform Act Precludes Federal Employees From Bringing Actions Under Other Statutes Regarding Claims Not Involving Adverse Personnel Actions

(1) The enactment in 1978 of the Civil Service Reform Act has spawned three decades of litigation about the effect of that statute on the judicial remedies that federal employees enjoyed prior to 1978. The recurring question has been

> whether [a particular provision] (or the CSRA as a whole) removes the jurisdiction given to the federal courts [to hear such claims] ... or otherwise precludes employees from pursuing remedies beyond those set out in the CSRA.

Whitman v. Department of Transportation, 547 U.S. 512, 514 (2006). The courts of appeals have long

disagreed about the preclusive effect of the CSRA.[2] This case presents the most important unresolved dispute about the impact of the CSRA: whether the Act precludes federal employees from pursuing non-CSRA judicial remedies for claims other than the type of adverse personnel actions covered by the Act.

"Congress' primary focus in the CSRA was on adverse actions." *Lindahl v. OPM*, 470 U.S. 768, 793 (1985). Chapter 75 of the CSRA establishes procedures for reviewing actions, such as dismissals, suspensions, or reduction in pay, taken against a federal employee because of misconduct or inadequate performance. In *United States v. Fausto*, 484 U.S. 439 (1988), this Court concluded that the CSRA precludes federal employees not authorized to obtain judicial review by Chapter 75 from bringing suit instead under the Back Pay Act to challenge such adverse personnel actions. "The CSRA established a comprehensive system for reviewing personnel action taken *against* federal employees." 484 U.S. at 455 (emphasis added). The terms of the CSRA, the Court concluded,

> combine to establish a congressional judgment that those employees should not be able to demand judicial review *for the type of personnel action covered by that chapter* [75].

484 U.S. at 446-48 (emphasis added).

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[2] *Compare Dugan v. Ramsay*, 727 F.2d 192, 194-95 (1st Cir. 1984) (opinion by Breyer, J.) *with Carducci v. Regan*, 714 F.2d 171, 173-75 (D.C.Cir. 1983) (opinion by Scalia, J.).

Fausto left unresolved whether the CSRA also barred judicial review regarding types of actions *not* "covered by that chapter." Since *Fausto* the lower courts have reached sharply conflicting conclusions about that question. Several circuits, most importantly the District of Columbia Circuit, hold that the CSRA bars judicial scrutiny under statutes other than the CSRA itself of all disputes related to federal employment, regardless of whether a particular claim is outside the scope of Chapter 75 or any other provision of the CSRA. The Federal Circuit and several others have repeatedly concluded – to the contrary – that the CSRA precludes judicial review under statutes other than the CSRA only of matters covered by the CSRA, e.g., of claims of adverse personnel actions.[3]

That recurring question was presented, but not resolved, in *Whitman v. Department of Transportation*. In *Whitman* the plaintiff had allegedly been subjected to repeated, non-random drug tests, in violation of 49 U.S.C. § 45102(b)(1). Such treatment was not an "adverse personnel action" under the CSRA because (unlike the sort of personnel actions covered by Chapter 75) the testing did not affect

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[3] In the instant case the District of Columbia Circuit thought it particularly clear that non-CSRA based actions are precluded against the Federal Aviation Administration. (Pet. App. 10a-11a). The Federal Circuit, on the other hand, has upheld just such a suit against the FAA. *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002).

Whitman's employment, grade, or pay[4] and because it was not based on any asserted misconduct or inadequate performance by Whitman. The government acknowledged that the drug testing did not constitute an adverse personnel action under the CSRA,[5] but urged the Court to extend the preclusion principle in *Fausto* to matters not covered by Chapter 75. The Solicitor General argued that the CSRA is the exclusive judicial remedy, not merely for adverse personnel actions, but for all "the employment claims of federal employees."[6]

This Court's decision in *Whitman*, however, did not resolve whether the preclusion rule in *Fausto*

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[4] As the government explained at the oral argument in *Whitman*,

> [I]n Bush v. Lucas, the Court specifically identified warrantless searches as an example of conduct in which an employer might engage towards its employees that would not constitute a personnel action. And we think that's good authority for the proposition that an allegedly unconstitutional drug test is not a personnel action. Now, if the employee had refused to take the test and had been dismissed or disciplined, that would be a personnel action.

2005 WL 3387693 at *55.

[5] As the government explained at the oral argument in *Fausto*, although a reduction in the pay of a particular employee would be a personnel action, it would fall outside the scope of Chapters 43 and 75 if imposed for reasons unrelated to misconduct or job performance, e.g., by mistake, or simply as a device to save money. 1987 U.S.Trans. LEXIS 194 at *9.

[6] Brief for Respondent, *Whitman v. Department of Transportation*, No. 04-1131, (October 20, 2005), at 14.

should be extended to all such employment matters affecting federal officials. The court of appeals in *Whitman* had held only that the CSRA did not itself confer jurisdiction over the claim in that case. 547 U.S. at 513-14. This Court noted that jurisdiction over "all civil actions arising under the ... laws ... of the United States" was already created by 28 U.S.C. § 1331. The dispositive issue in *Whitman* was whether the CSRA had removed the jurisdictional grant in section 1331 or otherwise precluded employees from pursuing remedies that existed prior to the enactment of the CSRA. Because the court of appeals in *Whitman* had not addressed those issues, this Court remanded the case to permit the lower courts to do so in the first instance. 547 U.S. at 514-15.

(2) The decision of the District of Columbia Circuit in the instant case resolved the precise question that the Ninth Circuit had failed to determine in *Whitman*. The court below reasoned that

> the case for [the] controllers begins and ends with the question identified as central by the Supreme Court in *Whitman* ... namely, "whether ... the CSRA as a whole ... removes the jurisdiction given to the federal courts or otherwise precludes employees from pursuing" a claim under the APA, *Whitman*, 547 U.S. at 514.

(Pet. App. 7a-8a) (emphasis omitted). The court of appeals concluded that "this APA claim [is] precluded by the structure of Congress's employment statutes

and 'the CSRA as a whole,' *Whitman*, 547 U.S. at 514." (Pet. App. 12a).

The circumstances of this case pose the issue left unresolved by *Whitman* and *Fausto* – whether the CSRA precludes judicial remedies for claims that do not arise out of adverse personnel actions, the subject matter of Chapter 75. The agency in this case did not alter in some adverse manner the circumstances of the plaintiffs' employment, such as by reducing their hours or classification; rather, the plaintiffs complain that the agency improperly refused to take favorable action that would have resulted in a substantial increase in their salaries. That decision, unlike the personnel decisions dealt with in Chapter 75, was not based on any misconduct or other personal failing of the plaintiffs themselves. Thus this action is not governed by the holding of *Fausto* that the CSRA bars remedies not contained in the CSRA for the "type of personnel action" covered by Chapter 75.

The District of Columbia Circuit held that CSRA preclusion extends to types of claims that are not covered by Chapter 75 and that do not in any other respect "concern '"a type of personnel action covered by the CSRA."'" (Pet. App. 10a) (quoting *Graham v. Ashcroft*, 358 F.3d 931, 934 (D.C.Cir. 2004)). Rather, the court of appeals held, the CSRA "preclude[s] litigation of an employment matter" – any employment matter – except where the CSRA itself authorizes judicial action. (Pet. App. 10a). "[W]e treat the CSRA and Congress's related employment statutes as covering the field of federal employee claims, and so

our cases expressly teach that those left out of this scheme are left out on purpose." (Pet. App. 10a-11a). Although there is a wide range of employment issues with which the CSRA does not deal at all, the court below reasoned that the CSRA's silence manifested "intentionally not providing ... particular forums and procedures" for all such omitted subjects. (Pet. App. 2a). The court of appeals thus concluded that the CSRA precludes judicial review or resolution of "federal employment disputes" except under the CSRA. (Pet. App. 2a).

This broad view of the preclusive effect of the CSRA dates from the District of Columbia Circuit's decision in *Carducci v. Regan*, 714 F.2d 171 (D.C.Cir. 1983). (See Pet. App. 1a) ("we have long held that federal employees may not use the Administrative Procedure Act to challenge agency employment action.") That interpretation of the CSRA was also recently applied by that Circuit in *Grosdidier v. Chairman, Broadcasting Board of Governors*, 560 F.3d 495, 496 (D.C.Cir. 2009) (stressing "the exclusivity of the CSRA for suits targeting personnel decisions" and "agency employment actions").[7]

The Sixth Circuit has given the CSRA a similarly broad preclusive effect. In *Harper v. Frank*, 985 F.2d 285 (6th Cir. 1993), the Sixth Circuit held that the

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[7] A certiorari petition is pending in *Grosdidier* raising the same question presented as the instant case.

CSRA precludes a claim asserting that the plaintiff was unlawfully denied a promotion.

> The direct holding of the Court in *Fausto* does not apply to [plaintiff's] complaint because the Postal Service's failure to promote her was not an adverse action under Chapter 75.... Although *Fausto's* holding relates only to attempts to obtain judicial review of adverse actions, its logic applies compellingly to claims for review of nonadverse actions.

985 F.2d at 290-91; see *Ryon v. O'Neill*, 894 F.2d 199, 204 (6th Cir. 1990) ("the structure of the CSRA indicate[s] that its [judicial] review provisions for personnel actions were intended to be exclusive").

The Eleventh Circuit also construes the CSRA to preclude all federal employment actions under statutes other than the CSRA and perhaps Title VII. *Broughton v. Courtney*, 861 F.2d 639, 643 (11th Cir. 1988) ("Congress intended the CSRA to provide an exclusive procedure for challenging federal personnel decisions"); see *Hendrix v. Snow*, 170 Fed.Appx. 68, 80 (11th Cir. 2006) ("outside of Title VII claims, both the Supreme Court and this Court have concluded generally that the CSRA provides the exclusive procedure for challenging federal personnel decisions").

(3) Four courts of appeals have rejected this broad preclusionary rule.

The Federal Circuit has repeatedly construed the CSRA, and applied the decision in *Fausto*, only to preclude judicial review under other statutes of those

personnel matters that *are* covered by the CSRA itself. In *Bosco v. United States*, 931 F.2d 879 (Fed. Cir. 1991), that Circuit held that the CSRA did not bar a claim by workers who objected to agency action altering the basis on which the wage for their positions were to be calculated. The government argued that the CSRA barred such suits because the Act was "the exclusive means of appealing an unwanted personnel action." 931 F.2d at 882. The court of appeals rejected that argument, holding that the CSRA provided the exclusive remedy only for the specific types of action addressed by the CSRA.

> The Supreme Court did not rule that the CSRA provided the only means of judicial review of *any* actions affecting federal employees, but rather that it was the only means of review as to the types of adverse personnel action specifically *covered* by the CSRA: Silence as to certain employees "displays a clear congressional intent to deny the excluded employees the protections of Chapter 75 – including judicial review – *for personnel action covered by that chapter*." 484 U.S. at 447 (emphasis added). *Fausto* involved an adverse personnel action of the general *type* covered by the CSRA, but against a particular *employee* who was *not* covered. In contrast, the instant case involves a type of personnel action not covered by the CSRA.... [T]he CSRA does *not* address the transfer of positions from one pay system to another. Since the CSRA thus does not cover the action taken in the instant case, it

> and the holding of *Fausto* have no application here.

931 F.2d at 883 (emphasis in original). Chapter 75, the Federal Circuit noted, concerned – and thus was the exclusive remedy only for – adverse actions based on misconduct and unacceptable performance. *Id.*[8]

In *Romero v. United States*, 38 F.3d 1204 (Fed. Cir. 1994), the Federal Circuit gave a similarly narrow reading of CSRA preclusion in upholding the authority of the federal courts to entertain a claim challenging the assertedly improper withholding of funds from the paychecks of federal workers. *Romero* was an appeal from a United States district court.[9] Relying on *Fausto*, "[t]he government argue[d] that ... district courts universally have no power to determine whether a 'personnel action' by a federal

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[8] The court reiterated that distinction in response to the government's petition for rehearing and suggestion for rehearing en banc.

> The Supreme Court in *Fausto* focussed on "precisely drawn provisions" with respect to Board and judicial review of adverse actions of any type within chapter 75 of the CSRA to infer a congressional judgment to preclude Board and judicial review.... 484 U.S. at 448-49.... [T]he Supreme Court grounded its holding in the peculiar context of adverse personnel actions. Such actions necessarily focus on the agency's appraisal of the misconduct of a particular employee. By contrast, reclassifications have nothing to do with appraisals of the actions of individual employees.

Bosco v. United States, 976 F.2d 710, 713-14 (Fed. Cir. 1992).

[9] See pp. 30-31, *infra*.

employer is justified." 38 F.3d at 1211. The Federal Circuit again rejected that argument, explaining that "when the passage [from *Fausto*] cited by the government is read in the context of the *Fausto* case, the government's argument loses any of its facial appeal." *Id.*

> *Fausto* does not hold that the CSRA makes impermissible "judicial review of *any* action affecting federal employees." *Bosco v. United States*, 931 F.2d 879, 883 (Fed. Cir. 1991). Rather, *Fausto* holds that the CSRA provides "the only means of review as to the types of adverse personnel action specifically *covered* by the CSRA." *Id.* The present case involves a type of personnel action – withholding of pay for income tax purposes – that "is not *covered* at all by the CSRA, for any employees." *Id.* There is no reason to suppose that the CSRA was intended to preclude this sort of action under the Back Pay Act and therefore *Fausto* is inapplicable.

Id.

In *Worthington v. United States*, 168 F.3d 24 (Fed. Cir. 1999), the Federal Circuit upheld on the same ground the authority of the federal courts to determine if a federal employee was entitled to backpay because he had been required to work a compressed schedule.

> This court has noted that *Fausto* deprives the Court of Federal Claims of jurisdiction over personnel actions covered by the CSRA....

> The CSRA, by its terms, however, does not encompass every adverse personnel action against a federal employee.... To determine the coverage of the CSRA, this court assessed the jurisdiction of the [Merit Systems Protection] Board.... [T]his court finds no law, rule, or regulation that gives the Board jurisdiction over Worthington's claim.... [B]ecause Worthington's claim is not within the coverage of the CSRA ... the Court of Federal Claims has jurisdiction to adjudicate this dispute.

168 F.3d at 26-27.[10]

The narrower preclusion rule in the Federal Circuit is of particular practical importance because it governs actions in the Court of Federal Claims, which has original jurisdiction under the Tucker Act over claims by federal employees throughout the nation.[11] Applying the Federal Circuit precedents in

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[10] Since *Worthington* the Federal Circuit rule has been sufficiently well established that that court of appeals has upheld federal jurisdiction over employment claims outside the scope of the CSRA without reiterating that circuit's longstanding rejection of the government's interpretation of *Fausto*. *Crowley v. United States*, 398 F.3d 1329 (Fed. Cir. 2005) (action for higher wages by federal employee claiming entitlement to supplemental pay under the Federal Law Enforcement Pay Reform Act); *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002) (action for backpay by federal employee asserting entitlement to pay differential for work in Alaska).

[11] That court has exclusive jurisdiction over Tucker Act claims exceeding $10,000. 28 U.S.C. § 1346(a)(2).

Bosco, *Romero*, and *Worthington*, the Court of Federal Claims has entertained and resolved a wide variety of federal employment actions that were not authorized by the CSRA itself. The Court of Federal Claims, for example, has repeatedly adjudicated claims that federal workers were being paid at a lower rate than the rate to which they were entitled. Those lawsuits included claims for severance pay,[12] overtime pay,[13] availability pay,[14] premium pay,[15] remote duty

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[12] *Sloan v. United States*, 36 Fed.Cl. 163, 165 (1996) (severance pay claim not barred by *Fausto* so long as court does not undertake to correct an adverse action); *Bell v. United States*, 23 Ct.Cl. 73, 77 (1991) (claim for severance pay does not require determination that dismissal was an "unjustified or unwarranted personnel action"; such claims are "analogous to ones for unpaid salary for time actually worked"); *Hedman v. United States*, 15 Ct.Cl. 304, 317-22 (1988) (distinguishing *Fausto*).

[13] *Adams v. United States*, 48 Fed.Cl. 602, 606 n.2 (2001) (action permissible because "[t]he denial of FLSA overtime pay falls outside the CSRA's coverage"; citing *Worthington*); *Abramson v. United States*, 42 Fed.Cl. 326, 332 (1998) ("[p]laintiffs claim overtime pay for overtime work.... The CSRA does not explicitly cover this claim"; citing *Romero*, *Worthington* and *Bosco*).

[14] *Vanderpool v. United States*, 84 Fed.Cl. 66, 78-79 (2008) ("[b]ecause none of the plaintiffs in this case initially received availability pay, there could be no reduction in pay, and ... the MSPB does not possess jurisdiction"; citing *Worthington*); *Bradley v. United States*, 42 Fed.Cl. 333, 336 (1998) (although the MSPB would have jurisdiction over a reduction in pay, "[p]laintiffs did not suffer a reduction in pay.... [P]laintiffs' claims are appropriately classified as ones for withholding pay as a result of a miscalculation on the part of the government"; distinguishing *Fausto*).

[15] *Contreras v. United States*, 64 Fed.Cl. 587 (2005) (disputes about premium pay are outside the jurisdiction of the

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allowances,[16] living quarter allowances,[17] travel expenses,[18] and pay retention benefits,[19] as well as claims that federal agencies failed to increase salaries as required by law.[20] Actions by individuals claiming they were unlawfully denied appointment to federal positions have been upheld where the basis of the claim was not covered by the CSRA.[21] None of these

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MSPB because "[t]o be deprived of [premium pay] is not to have one's pay reduced; it is to lose a bonus"; citing *Worthington*); *Hannon v. United States*, 48 Fed.Cl. 15, 25 (2000) ("[t]he plaintiffs do not allege entitlement as a result of a mistaken adverse personnel action, but seek ... premium pay ... for work they completed. As the CSRA does not cover such claims, the MSPB does not have jurisdiction over those claims"; citing *Worthington* and *Bosco*).

[16] *Agee v. United States*, 77 Fed.Cl. 84, 88 (2007) (although MSPB has exclusive jurisdiction over disputes regarding retirement benefits, pay claims can be adjudicated by courts even though they may affect those benefits).

[17] *Zervas v. United States*, 26 Ct.Cl. 1425 (1992) (relying on *Bosco*).

[18] *Bailey v. United States*, 52 Fed.Cl. 105 (2002) (relying on *Worthington*, *Romero*, and *Bosco*).

[19] *Zervas v. United States*, *supra*.

[20] *Berry v. United States*, 86 Fed.Cl. 24, 30 (2009) (claim for pay increase barred only if within the jurisdiction of the MSPB; citing *Worthington*); *King v. United States*, 81 Fed.Cl. 766, 771 (2008) ("[l]ike *Worthington*, and unlike *Fausto*, this case does not involve a personnel action governed by the CSRA because plaintiffs' claim for back pay is not based on personnel actions for unacceptable job performance, prohibited personnel practices, or adverse personnel actions").

[21] *Ainslie v. United States*, 55 Fed.Cl. 103, 108 n.2 (2003) (federal law mandating hiring of certain former military reservists; claim not barred because it was not "covered by the ...

(Continued on following page)

actions were authorized by the CSRA, and under the District of Columbia Circuit preclusion rule all of them were barred by the CSRA.

In those cases in which the Federal Circuit has concluded that a claim is precluded by the CSRA, its decision has been based on a finding that the specific claim at issue was indeed covered by the CSRA. *Read v. United States*, 254 F.3d 1064, 1067 (Fed. Cir. 2001) (a specific provision of the CSRA "covers the 'removal' of an employee," the action disputed by the plaintiff); *Gallo v. United States*, 529 F.3d 135, 1352 (Fed. Cir. 2008) (claim under Federal Employees' Compensation Act covered by the CSRA because the issue was "within the [MSPB]'s appellate jurisdiction under the CSRA").

Like the Federal Circuit, the Ninth Circuit applies a preclusion rule more limited than that in the District of Columbia Circuit. Except in cases involving adverse personnel actions similar to *Fausto*, in the Ninth Circuit the CSRA precludes an employment related claim of a federal worker only if the action complained of constituted a "prohibited personnel practice" forbidden by Chapter 23 of the CSRA.[22]

CSRA"); *Scholl v. United States*, 61 Fed.Cl. 322, 325 (2004) (mandatory reappointment of bankruptcy judges; claim not precluded by CSRA because it was not a "claim of the sort the [MSRB] has subject matter jurisdiction over"; relying on *Worthington*).

[22] *Mangano v. United States*, 529 F.3d 1243, 1246 (9th Cir. 2008) ("[t]he CSRA preempts Dr. Mangano's [Federal Tort Claims

(Continued on following page)

Thus in the Ninth Circuit such a federal employment claim is permitted if the action complained of was neither an adverse personnel action within the scope of the CSRA, nor a prohibited personnel practice forbidden by Chapter 23.

> [Plaintiff's allegations] fit no category of personnel actions listed in § 2302(a)(2). Her FTCA claims are therefore not preempted by the CSRA. The Government attempts to avoid this result by citing many of our previous holdings pertaining to the broad purpose and preemptive effect of the CSRA.... [The cases cited by the government] are distinguishable because the conduct in those cases, unlike the conduct alleged [by the plaintiff here], was within the scope of personnel actions prohibited by the CSRA. The CSRA is the exclusive remedy for all prohibited personnel actions.

Brock v. United States, 64 F.3d 1421, 1424-25 (9th Cir. 1995). That Ninth Circuit standard is reflected in the briefs filed by the government in that circuit.

Act] claims in this case if the conduct underlying his complaint can be challenged as 'prohibited personnel practices' within the meaning of the CSRA"); *Mahtesian v. Lee*, 406 F.3d 1131, 1134 (9th Cir. 2005); *Orsay v. United States Department of Justice*, 289 F.3d 1125, 1128 (9th Cir. 2002) ("[i]f the conduct that Appellants challenge in this action falls within the scope of the CSRA's 'prohibited personnel practices,' then the CSRA's administrative procedures are Appellant's only remedy, and the federal courts cannot resolve Appellant's claims under the Privacy Act and the FTCA").

"The 'controlling factor' in determining whether the CSRA preempts a claim is whether the action can be challenged as a 'prohibited personnel practice' under the CSRA. *Saul* [*v. United States*, 928 F.2d 829,] 841 [(9th Cir. 1991)]."[23]

The Tenth Circuit applies the same preclusion standard as the Ninth. "Federal and state court actions 'complain[ing] of activities prohibited by the CSRA ... are preempted by the CSRA.'" *Steele v. United States*, 19 F.3d 531, 533 (10th Cir. 1994) (quoting *Petrini v. Howard*, 918 F.2d 1482, 1485 (10th Cir. 1990)). The Second Circuit also appears to apply this standard. "[F]or claims falling within its purview, the CSRA provides the exclusive remedy. *Tiltti v. Weise*, [55 F.3d 596, 600 (2d Cir. 1998)]." *Sawyer v. Musumeci*, 1998 WL 743734 at *1 (2d Cir. 1998).[24]

(4) The District of Columbia Circuit recently expressed "doubts about [the Federal Circuit decision in] *Worthington*, which appears to be in significant

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[23] Brief of Defendant-Appellee, *Mangano v. United States*, No. 05-17334 (9th Cir.), 2006 WL 2427080 at *9.

[24] Although *Sawyer* is not officially reported, the government reads the reported decision in *Tiltti* in a similar manner. Brief for Defendants-Appellees, *Johnson v. United States*, 81 Fed.Appx. 388 (2d Cir. 2003), 2003 WL 24057791 at *15 ("The CSRA provides the exclusive remedy by which federal employees may challenge adverse personnel actions, more particularly denominated as 'prohibited personnel practices'; unless the CSRA either explicitly or by necessary implication sanctions judicial challenges *to such actions*, judicial challenge is foreclosed. *Tiltti v. Weise*.") (emphasis added).

tension with this court's precedents in *Filebark* ... and *Carducci*." *Grosdidier v. Chairman, Broadcasting Board of Governors,* 560 F.3d at 496. But there is far more than "significant tension" between the District of Columbia Circuit precedents in *Carducci*, *Grosdidier*, and the instant case on the one hand, and the Federal Circuit precedents in *Bosco*, *Romero* and *Worthington* on the other. Those deeply embedded sets of precedents are entirely inconsistent with one another; the Federal Circuit precedents have repeatedly rejected the sweeping preclusion rule that the government has advanced and that the District of Columbia Circuit has repeatedly embraced.

Referring to another leading Federal Circuit case, the court below commented that "it may ... be true that *Mudge* [*v. United States,* 308 F.3d 1220 (Fed. Cir. 2002)] correctly allowed the employees in that case to proceed." (Pet. App. 6a). But if, as the court below held, the CSRA provides the exclusive basis on which the federal courts can hear employment-related claims of federal workers, it is impossible to understand how the Federal Circuit in *Mudge* could properly have permitted that action to continue. In *Mudge* the Federal Circuit upheld the jurisdiction of the federal courts to entertain an action for backpay against the FAA – the very agency at issue in the instant case – brought by a federal employee who claimed he was entitled to premium pay for work in Alaska. The government argued in *Mudge* – just as it did in the instant case – that the federal courts could only entertain employment-related claims of federal

employees in those specific circumstances enumerated in the CSRA.[25] If the court of appeals below was correct in upholding that sweeping contention, the Federal Circuit decision in *Mudge* was necessarily incorrect.

II. This Inter-Circuit Conflict Involves An Important and Recurring Issue

Although this conflict involves a total of seven circuits, it is particularly important to resolve the conflict on this issue between the District of Columbia Circuit and the Federal Circuit. Approximately 280,000 federal employees work in the District of Columbia, a substantial portion of the federal civilian workforce. When a federal employment dispute arises in the District of Columbia, whether the governing preclusion standard is that of the District of Columbia Circuit or the Federal Circuit is controlled by whether the claim falls within the Federal Circuit's Tucker Act jurisdiction. If the claim of a federal worker can properly be cast as a claim within the scope of the Tucker Act, his or her lawsuit may well proceed in the Court of Federal Claims under the narrower Federal Circuit preclusion rule. If, however, as here, that claim does not fall within the Tucker Act, and thus must be brought in the District Court for the District of Columbia, that action will almost certainly be dismissed under the sweeping District of

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[25] Brief of Defendant-Appellee, 2002 WL 34235708 at *7-*8.

Columbia Circuit preclusion rule. A federal employee working in the District of Columbia who has an ongoing dispute about his or her rate of pay could not obtain an injunction, because that remedy would have to be sought in the District Court and would be governed by District of Columbia Circuit precedent; that same employee could, however, achieve the same result by bringing a series of backpay claims in the Court of Federal Claims, where Federal Circuit precedent applies. It is incongruous that federal appellate courts located only three Metro stops apart on the Red Line are applying to the claims of federal employees in the nation's capitol avowedly inconsistent and outcome determinative preclusion standards.[26]

The differing treatment of federal employees seeking the same type of remedy is equally incongruous. Many claims asserting that a federal employee is receiving insufficient compensation are within the Tucker Act jurisdiction of the Court of Federal Claims (and thus governed by the Federal Circuit preclusion rule), but not all. The Court of Federal Claims has upheld such compensation claims under the Bankruptcy Reform Act,[27] the Law Enforcement

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[26] Similarly, for federal employees in the Sixth and Eleventh Circuits, which CSRA preclusion rule applies turns not on the regional court of appeals within which the claim arises, but on the happenstance of whether the claim happens to fall within the subject matter jurisdiction of the Federal Circuit and is thus outside the authority of those regional appellate courts.

[27] *Scholl v. United States*, 61 Fed.Cl. 322 (2004).

Availability Pay Act,[28] the Federal Law Enforcement Pay Reform Act,[29] the Severance Pay Act,[30] the Fair Labor Standards Act,[31] the Kiess Act,[32] and a variety of other federal statutes.[33] In the instant case, however, the Federal Circuit concluded that only prospective compensatory relief was available, thus barring reliance on the Tucker Act. (Pet. App. 61a-62a). Petitioners' claim for increased compensation was thus adjudicated in the District of Columbia Circuit where, unlike compensation claims addressed in the Federal Circuit, it was rejected as precluded by the CSRA. That difference in outcome occurred solely because of the conflicting preclusion rules applied by the various circuits; no lower court to our knowledge has suggested that the CSRA itself should be read to distinguish in this way among federal employees asserting entitlement to a higher rate of pay.

Resolution of this conflict is of particular importance because of the unique appellate role of the

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[28] *Vanderpool v. United States*, 84 Fed.Cl. 66 (2008); *Bradley v. United States*, 42 Fed.Cl. 333 (1998).

[29] *Contreras v. United States*, 64 Fed.Cl. 583 (2005); *Hannon v. United States*, 48 Fed.Cl. 15 (2000).

[30] *Sloan v. United States*, 36 Fed.Cl. 163 (1996); *Hedman v. United States*, 15 Ct.Cl. 304 (1988).

[31] *Agee v. United States*, 77 Fed.Cl. 84 (2007); *Adams v. United States*, 48 Fed.Cl. 602 (2001).

[32] *Abramson v. United States*, 42 Fed.Cl. 326 (1998).

[33] *Ainslie v. United States*, 55 Fed.Cl. 103 (5 U.S.C. § 3329(b)); *King v. United States*, 81 Fed.Cl. 766 (2008) (28 U.S.C. § 540C).

Federal Circuit. In cases filed in a district court anywhere in the United States, if that district court's jurisdiction was "based, in whole or in part, on section 1346" of Title 28, the Little Tucker Act, any appeal is to the Court of Appeals for the Federal Circuit, rather than to the regional court of appeals for the circuit in which the district court is located. 29 U.S.C. § 1295(a)(2); see *United States v. Hohri*, 482 U.S. 64 (1987). The Federal Circuit decision in *Romero*, for example, overturned the decision of a district court in the First Circuit that had held the claim in that case was barred by the CSRA;[34] a number of other Federal Circuit decisions applying that Circuit's view of the limited preclusive effect of the CSRA involved appeals from the regional district courts.[35] In any case under the Administrative Procedure Act, or any other federal statute, in which the plaintiff could include a colorable section 1346 claim, the appeal would lie to the Federal Circuit, which limits CSRA preclusion to adverse personnel action cases. That would include, as in *Hohri* itself, an action filed in the District Court for the District of Columbia.

The United States has repeatedly recognized the considerable practical importance of whether the

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[34] *Romero v. Brady*, 764 F.Supp. 227, 237-38 (D.P.R. 1991).

[35] E.g., *Muniz v. United States*, 972 F.2d 1304 (Fed. Cir. 1992) (appeal from the District Court for the Northern District of California); *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990) (en banc) (appeal from the District Court for the Central District of California).

CSRA precludes actions by individuals for whom the CSRA itself provides no judicial remedy. In *United States v. Fausto*, in seeking review by this Court of the Federal Circuit decision permitting certain federal employees to obtain review of adverse personnel actions, the government correctly emphasized that the issue was one of "considerable practical importance to the federal government."[36] In *Cooper v. Kotarski*, 487 U.S. 1212 (1988), the government asked this Court to decide whether a federal employee can bring a constitutional challenge to removal from a probationary position. See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The United States explained that the question was "of great and recurring practical importance to the federal government," and highlighted the "significant disparity in the treatment of federal employees, depending solely upon where they reside."[37] In its response in *Whitman*, agreeing in part that certiorari should be granted, the United States noted the "considerable practical importance [of the issue] to the Nation's largest employer and its employees," pointed out that there was an "untenable lack of uniformity in federal employment law."[38] On six occasions in which a circuit court has held that a federal

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[36] Petition for Writ of Certiorari, *United States v. Fausto*, No. 86-595, at 16.

[37] Petition for Writ of Certiorari, *Cooper v. Kotarski*, No. 86-1813, at 10, 15.

[38] *Whitman v. Department of Transportation*, Brief of Respondent, at 20 (June 6, 2005).

employee could bring an action under a statute other than the CSRA, the United States has sought rehearing en banc in that court of appeals, arguing that the issue was one of sufficient importance to warrant that exceptional treatment.[39] See Fed. Rule App. Pro. 35(b)(1)(B).

In *Weber v. Department of Veterans Affairs*, 129 S.Ct. 754 (2009), the petitioner asserted that the court of appeals decision in that case was inconsistent with the Federal Circuit decisions in *Romero* and *Bosco*.[40] The government argued in its response that *Weber* was not an appropriate vehicle for raising that issue because the petitioner's claims in that case *were* covered by the CSRA. Weber was challenging his dismissal, an adverse personnel action under the CSRA; like the plaintiff in *Fausto*, Weber could not invoke the remedies in Chapter 75 because he was outside the definition of "employees" protected by that provision. The government correctly explained why the dismissal of Weber's claim was thus not inconsistent with *Romero* and *Bosco*.

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[39] See *Crowley v. United States*, 398 F.3d 1329 (Fed. Cir. 2005) (petition for rehearing denied); *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002) (petition for rehearing en banc denied); *Burroughs v. OPM*, 784 F.2d 933 (9th Cir. 1986) (denying rehearing en banc); *Fausto v. United States*, 791 F.2d 1554 (Fed. Cir. 1986) (denying rehearing en banc); *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990) (en banc); *Bosco v. United States*, 976 F.2d 710 (Fed. Cir. 1992) (denying rehearing en banc).

[40] Petition for Writ of Certiorari, *Weber v. Department of Veterans Affairs*, No. 08-281 at 11.

> In *Romero*, the Federal Circuit interpreted this Court's holding in *Fausto* as being inapplicable to "the type of personnel action – withholding of pay for income tax purposes – that 'is not covered at all by the CSRA, for any employees.'" *Romero*, 38 F.3d at 1211 ... ; accord *Bosco*, 931 F.2d at 833 (viewing *Fausto* as holding that the CSRA is "the only means of review as to the *types* of adverse personnel action specifically *covered* by the CSRA" (first emphasis added)). But the "type of personnel action" at issue in this case – separation from the service – is *expressly* addressed by the CSRA.

Brief for the Respondents in Opposition, *Weber v. Department of Veterans Affairs*, No. 08-281 at 11 (Nov. 3, 2008).

Here, unlike *Weber*, the petitioners' claims clearly are not "addressed by the CSRA." The underlying claim – that the employing agency was required to reclassify the facility at which the petitioners work – an action which would inexorably raise their salaries – bears not the slightest resemblance to the matters covered by the CSRA. This case presents an appropriate vehicle for resolving the question presented. The court below squarely resolved the issue framed by *Whitman*, holding that the CSRA precludes an action that otherwise (and prior to the enactment of the CSRA) would have been actionable under the Administrative Procedure Act. The district court earlier held that the plaintiffs had done all they could to exhaust their claim (Pet. App. 22a-23a), and the government

did not seek to reopen that issue in the court of appeals. The linchpin of the District of Columbia's broad preclusion rule – the specific and limited grant of judicial review in Chapter 75 of the CSRA – is expressly applicable to FAA employees. 49 U.S.C. § 40122(g)(3).

Earlier this year in an appeal in the District of Columbia Circuit the government pointed out that

> the Federal Circuit's *Worthington* decision is not binding on this Court. "The federal courts spread across the country owe respect to each other's efforts ... , but each has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court...."[41]

Certiorari should be granted to establish the binding precedent that this Court alone can provide.

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[41] Brief for Appellee, *Grosdidier v. Chairman, Broadcasting Board of Governors*, No. 08-5181 (D.C.Cir.), at 22 n.5 (*quoting In Re Korean Airlines Disaster of September 1, 1983*, 829 F.2d 1171, 1176 (D.C.Cir. 1987)).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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555 F.3d 1009

United States Court of Appeals,
District of Columbia Circuit.
Joseph J. FILEBARK, II, et al., Appellants
v.
UNITED STATES DEPARTMENT OF TRANSPORTATION and Federal Aviation Administration, Appellees.
No. 08-5163.

Argued Jan. 13, 2009.
Decided Feb. 13, 2009.

George M. Chuzi argued the cause and filed the briefs for appellant.

Beverly M. Russell, Assistant U.S. Attorney, argued the cause for appellees. With her on the brief were Jeffrey A. Taylor, U.S. Attorney, R. Craig Lawrence, Assistant U.S. Attorney, and Elizabeth J. Head, Attorney, Federal Aviation Administration.

Before: HENDERSON, TATEL, and GARLAND, Circuit Judges.

Opinion for the Court filed by Circuit Judge TATEL.

TATEL, Circuit Judge.

We have long held that federal employees may not use the Administrative Procedure Act to challenge agency employment actions. *See Fornaro v. James*, 416 F.3d 63, 66-67 (D.C.Cir.2005); *Graham v. Ashcroft*, 358 F.3d 931, 933-35 (D.C.Cir.2004); *Carducci v. Regan*, 714 F.2d 171, 172 (D.C.Cir.1983). This is so

because Congress, through the Civil Service Reform Act of 1978, Pub.L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.), and related employment statutes, has carefully constructed a system for review and resolution of federal employment disputes, intentionally providing – and intentionally not providing – particular forums and procedures for particular kinds of claims. As such, we have held that this comprehensive employment scheme preempts judicial review under the more general APA even when that scheme provides no judicial relief – that is, "what you get under the CSRA is what you get." *Fornaro,* 416 F.3d at 67. In this case four air traffic controllers nonetheless argue that they may use the APA to litigate their pay dispute with the Federal Aviation Administration because the CSRA provides them no protection. Straightforwardly applying our precedent, we affirm the district court's dismissal of their suit.

I.

Appellants are four air traffic controllers of the Albuquerque, New Mexico Air Traffic Control Center. Two are bargaining unit members represented by the National Air Traffic Controllers Association (NATCA) while two are excluded from the unit as supervisors, but agreements between NATCA and the FAA control the pay of all four. Under those agreements, salary levels vary from airport to airport based on the amount and complexity of the air traffic they manage. The controllers believe the Albuquerque Center's

salary level is set too low because, in their view, the site's traffic figures erroneously exclude certain military flights.

In April 2000, one of the bargaining unit employees, appellant Joseph Filebark II, following the procedure set out in his collective bargaining agreement, filed a grievance about the salary-level classification with the Albuquerque Center. That grievance was denied, and when Filebark asked the union to pursue the matter to arbitration, the union declined. The Center itself later applied to the FAA for a salary-level upgrade, but that request was denied pending validation of the computer systems that measure air traffic. Although NATCA eventually filed a grievance on behalf of employees at the Albuquerque Center, it withdrew that grievance before it was decided. Meanwhile, one of the non-bargaining unit controllers attempted to file a grievance, which was refused. He later sued in the Court of Federal Claims on a contract theory, but the court rejected his claim as outside its Tucker Act jurisdiction. *Todd v. United States,* 56 Fed.Cl. 449, 453 (2003), *aff'd,* 386 F.3d 1091 (Fed.Cir.2004).

Having failed to obtain review on the merits through any of these avenues, the controllers brought a two-count complaint in United States District Court for the District of Columbia. Count I sought review of Filebark's denied grievance, identifying 5 U.S.C. § 7121(a)(1), a provision of the CSRA, as the statutory basis for judicial review of negotiated grievance procedures. Am. Compl. ¶¶ 37-38. Count II sought

APA review of the Albuquerque Center's salary-level classification on behalf of all plaintiffs. *Id.* ¶¶ 39-42. Concluding that section 7121(a)(1), rather than authorizing the suit, "precludes [employees with negotiated grievance procedures] from seeking judicial review" of any kind, *Filebark v. U.S. Dep't of Transp. (Filebark I),* 468 F.Supp.2d 3, 6 (D.D.C.2006), the district court dismissed both counts brought by the bargaining unit employees, eliminating Count I entirely and leaving only the APA claims of the non-bargaining unit supervisors, *id.* at 6. Addressing and rejecting only one argument – regarding exhaustion of administrative remedies – the district court allowed the supervisors' APA claims to go forward. *Id.* at 7-8. By minute order, the district court denied both sides' requests for reconsideration. In a second opinion, however, it dismissed the supervisors' APA claims, finding them precluded under our CSRA precedents. *Filebark v. Dep't of Transp. (Filebark II),* 542 F.Supp.2d 1, 6-9 (D.D.C.2008).

Significantly for our purposes, the FAA is largely exempted from the CSRA by 49 U.S.C. § 40122(g)(1), which directs the FAA to develop "a personnel management system for the Administration that addresses the unique demands on the agency's workforce,""notwithstanding the provisions of title 5 [i.e., the CSRA] and other Federal personnel laws." *See also* § 40122(g)(2) ("The provisions of title 5 shall not apply to the new personnel management system. . . ."). Congress required that "[s]uch a new system shall, at a minimum, provide for greater flexibility in the

hiring, training, compensation, and location of personnel." § 40122(g)(1). In response the FAA created a personnel management system with dispute resolution provisions that largely track those of the CSRA, providing greater review for major adverse actions and no review for minor actions like this pay-scale dispute. The general exemption from the CSRA has certain exceptions, however, as CSRA provisions such as "chapter 71, relating to labor-management relations," continue to apply. § 40122(g)(2)(C).

Among the provisions in that chapter that still apply is section 7121(a)(1), which requires that collective bargaining agreements contain negotiated procedures for the settlement of grievances, and which the controllers cite as the statutory basis for Count I of their amended complaint. This section previously provided that such negotiated grievance procedures would be "the exclusive procedures for resolving grievances which fall within its coverage." 5 U.S.C. § 7121(a)(1) (1994). In 1994, however, Congress amended section 7121(a)(1) to make negotiated grievance procedures "the exclusive *administrative* procedures for resolving grievances which fall within its coverage." § 7121(a)(1) (emphasis added). Having held that the earlier version of this section precluded all judicial review for employees with negotiated grievance procedures, *Carter v. Gibbs*, 909 F.2d 1452, 1454 (Fed.Cir.1990) (en banc), the Federal Circuit recently reversed course, holding that the 1994 amendment signaled Congress's intent no longer to

preclude all review of covered grievances. *Mudge v. United States,* 308 F.3d 1220, 1227 (Fed.Cir.2002).

Seeking reversal of the district court's ruling that they have no cause of action, the controllers make three arguments: (1) that the district court erred in dismissing the bargaining unit members because section 7121(a)(1), as amended, no longer precludes judicial review of negotiated grievance procedures; (2) that by revisiting dismissal of the APA claims, the district court violated the law of the case; and (3) that because their employer is largely exempt from the CSRA, the controllers can maintain an APA cause of action notwithstanding our CSRA preclusion precedents. We consider each argument in turn.

II.

The controllers' first argument – applicable only to the bargaining unit members – lacks in relevance whatever it might have in merit. It may be true that in amending section 7121(a)(1) Congress intended no longer to preclude all judicial review for employees with negotiated grievance procedures; it may also be true that *Mudge* correctly allowed the employees in that case to proceed; it may even be true that the district court's first opinion in this case erroneously used section 7121(a)(1) as justification for dismissing all bargaining-unit employee claims. But even if section 7121(a)(1) no longer has this preclusive effect, it is emphatically untrue that "§ 7121(a)(1) *establishes* [a] federal employee's right to seek judicial remedy

for [a] grievance subject to negotiated procedures in [a] collective bargaining agreement," as the controllers maintain in their complaint, Am. Compl. ¶ 37 (emphasis added). To the contrary, as the Supreme Court explained in *Whitman v. Department of Transportation,* 547 U.S. 512, 513, 126 S.Ct. 2014, 164 L.Ed.2d 771 (2006), section "7121(a)(1) does not confer jurisdiction," nor does it create a cause of action.

Because section 7121(a)(1), by itself, provides no right to sue, the bargaining unit employees must point to an independent source of law in order to maintain this action. In *Mudge* a money claim within the Tucker Act jurisdiction of the Court of Federal Claims provided the cause of action, *see* 28 U.S.C. § 1491(a)(1); *Mudge v. United States,* 50 Fed.Cl. 500, 502 (Fed.Cl.2001); in *Carter,* the case that *Mudge* held overruled by the 1994 amendment, the Fair Labor Standards Act, 29 U.S.C. § 216(b), provided the cause of action, *see* 909 F.2d at 1453. Neither is available here. In fact, the only basis for a cause of action the bargaining unit controllers even mention in their complaint is the APA – the same source identified by the non-bargaining unit controllers. Thus, the case for all four controllers begins and ends with the question identified as central by the Supreme Court in *Whitman* and answered in the district court's second opinion – namely "whether § 7121 (*or the CSRA as a whole*) removes the jurisdiction given to the federal courts or otherwise precludes employees from pursuing" a claim under the APA,

Whitman, 547 U.S. at 514, 126 S.Ct. 2014 (emphasis added, citation omitted). If we answer that question in the affirmative, then neither the bargaining unit members nor the supervisors have a claim, whether or not the district court, in its first opinion, properly relied on section 7121(a)(1) to dismiss all bargaining unit employee claims.

Before we address that question, however, we must resolve a preliminary matter. The controllers argue that by reversing its previous denial of dismissal on the APA claims without a change in facts or law the district court violated the law of the case doctrine. In its second opinion, the district court explained the change as based in "the parties' lack of clarity regarding their arguments," and held that reconsidering the issue would not violate the law of the case because failing to reconsider would "be erroneous and work a manifest injustice." *Filebark II,* 542 F.Supp.2d at 5 n. 10.These justifications matter not at all, however, because the law of the case doctrine just doesn't apply here. Federal Rule of Civil Procedure 54(b) provides that "any order or other decision, however designated, that adjudicates fewer than all the claims . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." The district court's first denial of dismissal was never a final judgment and never subject to appeal, and such "[i]nterlocutory orders are not subject to the law of the case doctrine and may always be reconsidered prior to final judgment," *Langevine v. District of Columbia,* 106 F.3d

1018, 1023 (D.C.Cir.1997). Accordingly, the district court was free to reconsider the motion to dismiss the controllers' APA-based employment claim, as we are free to consider that question now.

Reviewing de novo the dismissal of the APA claims, *e.g., Munsell v. Dep't of Agric.*, 509 F.3d 572, 578 (D.C.Cir.2007), we find no error in the district court's decision. Twenty-five years ago, in *Carducci v. Regan*, we held that "the exhaustive remedial scheme of the CSRA would be impermissibly frustrated by permitting, for lesser personnel actions not involving constitutional claims, an access to the courts more immediate and direct than the statute provides with regard to major adverse actions." 714 F.2d at 174. Holding that "failure to include some types of [claims] within the remedial scheme of so comprehensive a piece of legislation reflects a congressional intent that no judicial relief be available," we found an APA remedy beyond that provided in the CSRA precluded by the comprehensiveness of the CSRA itself. *Id.* at 174-75. The Supreme Court reached a similar conclusion five years later in *United States v. Fausto*, holding that the exclusion of particular employees (rather than particular claims) from the CSRA was not an invitation to those employees to sue under other statutes but a "manifestation of a considered congressional judgment that they should not have statutory entitlement to review." 484 U.S. 439, 448-49, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988).

We clarified the breadth of these precedents in two recent cases. In *Graham v. Ashcroft*, we held that

the lack of any entitlement to judicial review in the CSRA precluded litigation of an employment matter under the APA even where the complaint did not concern "'a *type* of personnel action covered by the CSRA.'" 358 F.3d 931, 934 (D.C.Cir.2004) (quoting *Fausto,* 484 U.S. at 448, 108 S.Ct. 668 (emphasis added, brackets omitted)). Thus, we found preclusion not because the CSRA identified some other kind of plaintiff or some other kind of procedure for bringing the claim, but because it provided no way of bringing it. As to such claims we said, "the CSRA provides no relief and precludes other avenues of relief." *Id.* at 935. One year later in *Fornaro* we made the point even more directly, holding that "what you get under the CSRA is what you get." 416 F.3d at 67. Not one of our precedents has cited section 7121(a)(1) in so holding, and the controllers nowhere argue that the 1994 amendment affects these cases or their now-familiar analysis.

To be sure, the controllers correctly point out that Congress largely exempted the FAA from the CSRA, and that we have never before had occasion to apply our preclusion cases to employees of an exempt agency. But the upshot of our precedents for this case is absolutely clear. Far from saving an APA claim, Congress's exemption of these controllers' agency from the CSRA signals the same thing as Congress's omission of the type of personnel action at issue in *Graham* or the type of employees at issue in *Fausto* – namely that Congress intended to provide these employees with no judicial review. This is because we

treat the CSRA and Congress's related employment statutes as covering the field of federal employee claims, and so our cases expressly teach that those left out of this scheme are left out on purpose. Indeed this case is easier than most, for we need make no inferences about the pregnant meaning of legislative silence. In exempting the FAA from the CSRA, Congress made its intent perfectly clear: to "provide for greater flexibility in the hiring, training, compensation, and location of personnel." 49 U.S.C. § 40122(g)(1). Because giving FAA employees a unique right of access to the courts would frustrate rather than further that intent, proper application of our precedents bars this suit. *See also McAuliffe v. Rice,* 966 F.2d 979, 980-81 (5th Cir.1992) (reaching same conclusion as to different entity exempted from CSRA because allowing APA review would "thwart[ ] the goal of maintaining flexibility").

The controllers argue that "[w]hatever the scope of the 'flexibility' which Congress granted to the FAA, it is inconceivable that Congress authorized the FAA to devise a compensation plan for its Controllers and then violate that plan with impunity and without review." Appellants' Opening Br. 30. The controllers never develop this apparent due process argument, nor could they, for even its factual premise is flawed. The controllers do have a remedy: if the FAA fails to live up to its agreements, the union can pursue the matter, *see, e.g.,* Mot. to Dismiss Ex. 9 (union grievance regarding Albuquerque Center salary level), and if the union fails to live up to its duty of

representation, the controllers can pursue the union, *see Steadman v. Governor, U.S. Soldiers' and Airmen's Home,* 918 F.2d 963, 966 (D.C.Cir.1990) ("A failure to seek arbitration (which an employee may not compel on his own) may constitute such a breach of the union's duty [of fair representation]. But, in that event, only the FLRA – not a district court – may remedy the breach by ordering arbitration."). These procedures surely lack the directness and immediacy of an APA suit, and the controllers have apparently found them frustrating, Appellants' Reply Br. 6-7 n. 5 (accusing NACTA [sic] of "machinations" designed to defeat Filebark's claims). But the choice of procedures lies with Congress, and as we have repeatedly held, Congress had no intention of providing claimants like these – unmentioned in the CSRA – with a level of access to the courts unavailable to almost any other federal employees, including those that the CSRA identifies as most worthy of procedural protection. *See Graham,* 358 F.3d at 935 (citing *Fausto* and *Carducci* for the proposition that giving direct APA review to claimants not entitled to review procedures under the CSRA would upset careful congressional layering of remedial procedures). Thus, we find this APA claim precluded by the structure of Congress's employment statutes and "the CSRA as a whole," *Whitman,* 547 U.S. at 514, 126 S.Ct. 2014.

III.

Because the controllers identify only the APA as the statutory basis for their claims, and because such

claims are precluded by the CSRA as a whole regardless of who brings them, we affirm.

So ordered.

468 F.Supp.2d 3

United States District Court,
District of Columbia.
FILEBARK, et al., Plaintiffs,
v.
U.S. DEPARTMENT OF TRANSPORTATION, et al.
Defendants.
No. 03-1685 (RJL).

Feb. 27, 2006.

George Michael Chuzi, Kalijarvi, Chuzi & Newman, Washington, DC, for Plaintiffs.

Beverly Marie Russell, U.S. Attorney's Office, Washington, DC, for Defendants.

MEMORANDUM OPINION AND ORDER

(February *23rd* 2006)

LEON, District Judge.

Plaintiffs, two current or former Air Traffic Controllers and one Air Traffic Control Supervisor at the Albuquerque, New Mexico Air Traffic Control Center ("Albuquerque Center"), brought this action seeking: (1) declaratory and injunctive relief against the defendants, the Federal Aviation Administration ("FAA"); and (2) the Department of Transportation, and back pay from defendants' for allegedly violating agency rules and the collective bargaining agreement between the FAA and the National Air Traffic Controllers Association ("NATCA"). Upon consideration of defendants' motion and the entire record herein, the

Court GRANTS defendants' Motion to Dismiss as to plaintiffs Filebark and Havens and DENIES defendants' Motion to Dismiss as to plaintiff Todd.[1]

FACTUAL BACKGROUND

Plaintiff Filebark is, and plaintiff Havens was, an Air Traffic Control Specialist at the Albuquerque Center. (Am.Compl. ¶ 7.) Plaintiff Todd is currently a Air Traffic Control Supervisor at the Albuquerque Center. (*Id.* at ¶ 8.) Plaintiffs Filebark and Havens are bargaining unit employees exclusively represented by the NATCA in labor-management dealings with the FAA. (*Id.*) NATCA and the FAA have a negotiated collective bargaining agreement ("CBA")

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[1] Federal courts are courts of limited jurisdiction, possessing only those powers specifically granted to them by either the United States Constitution or Congress. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). If a court determines that it lacks subject matter jurisdiction to hear and decide a claim, the claim must be dismissed. Fed.R.Civ.P. 12(b)(1). All matters are presumed to lie outside the limited jurisdiction of the federal courts until the plaintiff establishes that subject matter jurisdiction is proper. *Rasul v. Bush*, 215 F.Supp.2d 55, 61 (D.D.C.2002). Nevertheless, the complaint must be construed liberally and a plaintiff should receive the benefit of all favorable inferences that can be drawn from the alleged facts *E.E.O.C. v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C.Cir.1997). When reviewing a motion to dismiss for lack of jurisdiction pursuant to Rule 12(b)(1), the court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

that governs plaintiffs Filebark's and Haven's employment. (Defs.' Mot. to Dismiss ("Defs.' Mot.") Ex. 1.) Since plaintiff Todd is an Air Traffic Control Supervisor, he is excluded from representation by NATCA; therefore, the CBA does not apply to him. (Am.Compl. ¶ 8; Pls.' Opp'n to Defs.' Mot. to Dismiss and Supporting Mem. of Points and Authorities ("Pls.' Opp'n") Ex. 13 at 1, ¶ 2; *see*5 U.S.C. § 7112(b) (prohibiting unions from representing supervisors).) Therefore, Todd's claims need to be evaluated independently.

A. *Plaintiffs Filebark and Havens' Claims*

Plaintiffs Filebark and Havens allege that the air traffic counts used to determine their compensation at the Albuquerque Center are inaccurate because they fail to take into account military traffic, a problem acknowledged by the FAA. (Am.Compl.¶ 30.) They argue that if military traffic had been taken into account, the Albuquerque Center's Air Traffic Compensation System ("ATC") Level[2] would be

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[2] In 1995, Congress directed the FAA Administrator to develop and implement a new personnel management system ("PMS") for the FAA which put into effect a new compensation and classification system which would classify FAA facilities and determine the pay of the FAA workers at those facilities. 49 U.S.C. § 40122(g). The new PMS included an Air Traffic Compensation System ("ATC") involving a Position Classification Standard that categorized facilities based on traffic count with scores ranging from ATC Level 3-12. (Am. Compl. ¶ 13; Defs.' Mot. 2-3.) An FFA [sic] employee's salary is scaled according to

(Continued on following page)

increased and consequently plaintiffs' pay would increase. (*Id.* at ¶¶ 22-31.) Filebark and Havens allege that the FAA did not take any action in response to the Albuquerque Center's application for an upgrade in its ATC Level classification. (*Id.* at ¶ 31.) Indeed, plaintiff Filebark filed an Unfair Labor Practice charge against the FAA for its failure to do so, but it was dismissed, in part, because NATCA had already filed a grievance pertaining to the same action. (Defs.' Mot. 4; *see* Am. Compl. ¶¶ 33-35.) Subsequently, however, NATCA withdrew its grievance and request for arbitration. (Defs.' Mot. 4, Ex. 12.) Nevertheless, both Filebark and Havens allege that the FAA failed to comply with the bargained for CBA between the FAA and the NATCA and seek judicial review of these actions. (Am.Compl. ¶¶ 37-42.) Plaintiff Filebark also seeks review of the decision regarding the grievance he filed. (*Id.* at ¶ 37.) Defendants contend, however, that section 7121(a)(1) of Title 5 of the United States Code precludes them from seeking judicial review of the FAA determination of the Albuquerque Center's ATC Level and of

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the ATC Level assigned to the facility at which he or she is employed. (Am.Compl.¶ 13.) ATC Levels are calculated with the use of a formula, based on the volume of air traffic at a facility, implemented by the FAA. (*Id.*) On October 1, 1998, an FAA Administrator issued a message that extended the pay agreement negotiated by the FAA and NATCA, for FAA employees under the CBA, to supervisors and managers who work at FAA facilities. (Am. Compl. ¶ 20; Pls.' Opp'n Ex. 2.)

plaintiff Filebark's grievance. For the following reasons, the Court agrees.

> Section 40122(g)(2) of the FAA PMS states that the provisions of Title 5 of the United States Code, 5 U.S.C. §§ 101 *et seq.*, "shall not apply to the new personal [sic] management system developed and implemented." 49 U.S.C. § 40122(g)(2). However, the FAA PMS did state that certain provisions of Title 5 would apply as exceptions. *Id.* One of those exceptions is chapter 71, relating to labor-management relations, 5 U.S.C. §§ 7101 *et seq. Id.*

Our Circuit Court, in *Johnson v. Peterson,* held that it will recognize federal court jurisdiction over a matter covered by the Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. §§ 7101 *et seq., only* where the statute expressly provides for such jurisdiction.[3]

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[3] Certain provisions of Title 5 of the United States Code generally no longer apply to FAA personnel. 49 U.S.C. § 40122(g)(2). One exception to the inapplicability of Title 5 is chapter 71, 5 U.S.C. §§ 7101 *et seq.*, which relates to labor-management relations. *Id.* at § 40122(g)(2)(C). It is within chapter 71 of Title 5 of the United States Code that the procedures for resolving grievances relating to a CBA are found: "[A]ny collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. [With some exceptions,] the procedures shall be the exclusive *administrative* procedures for resolving grievances which fall within its coverage." 5 U.S.C. § 7121(a)(1) (emphasis added to reflect language added by 1994 Amendment, Pub.L. No. 103-424, § 9(c)(2), 108 Stat. 4365 (1994)).

(Continued on following page)

996 F.2d at 401 ("[R]eading between the lines [of the CSRA] to interpolate remedies Congress did not provide can only lead the Court into error. Accordingly, we decline to create a method by which the employee can short-circuit the administrative process without the explicit authorization of Congress." (quotation marks omitted; second alteration in original)). Title 5 of the United States Code section § 7121(a)(1) does not expressly provide this Court with the jurisdiction to resolve a grievance under the NATCA/FAA CBA which contains negotiated grievance procedures. And while the plaintiffs urge this Court to adopt the Federal and Eleventh Circuits interpretative approach to finding jurisdiction via a

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While plaintiffs urge that this Court follow the decision in *Mudge v. United States*, 308 F.3d 1220 (Fed.Cir.2002), and allow judicial review of this administrative decision, the defendants contend that *Johnson v. Peterson*, 996 F.2d 397, 401 (D.C.Cir.1993), is binding on this Court. (Pls.' Opp'n 18-19; Defs.' Mot. 12.) *Mudge* was decided in the Federal Circuit and held that 5 U.S.C. § 7121(a)(1) allowed for judicial review of grievance procedures under a collective bargaining agreement because of the addition of the word "administrative" to the statute in the 1994 amendments, 308 F.3d at 1227-28. In other words, *Mudge* states that the amendment narrowed the statute such that the grievance procedures provided in a collective bargaining agreement are the exclusive procedures only to the extent that they are administrative and, therefore, judicial review is not precluded. *Id.*; *see also Asociacion De Empleados Del Area Canalera (ASEDAC) v. Panama Canal Commission*, 329 F.3d 1235 (11th Cir.2003).

1994 amendment to the statute, this Court does not believe doing so would be consistent with the spirit, and letter, of our Circuit's precedent in *Johnson*. Therefore, after reviewing the pleadings, this Court GRANTS defendants' Motion to Dismiss as to plaintiffs Filebark and Havens.[4]

B. *Plaintiff Todd's Claim*

Plaintiff Todd, as a non-bargaining unit employee of the Albuquerque Center, also seeks review of the FAA decisions as to the proper ATC Level classification of the Albuquerque Center as it relates to his salary level.[5] (Am.Compl.¶¶ 8, 39.) Defendants contend that plaintiff Todd's action must be dismissed because he failed to exhaust his administrative remedies and because he already brought an action in the Court of Federal Claims regarding the same issue. (Defs.' Mot. 5, 9 n. 2.) After reviewing the

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[4] The Ninth Circuit has held in *Whitman v. Department of Transportation* that the addition of the word "administrative" in 5 U.S.C. § 7121(a)(1) does not constitute an express grant of federal court jurisdiction over such claims. 382 F.3d 938, 943-44 (9th Cir.2004). This decision conflicts with the decisions of the Federal Circuit and the Eleventh Circuit in *Mudge* and *ASE-DAC* respectively. The Supreme Court granted certiorari in *Whitman* on June 27, 2005 and oral argument was held on December 5, 2005. *See* www.supremecourtus.gov/oralarguments/argument_calendars.html.

[5] According to a message from Administrator Garvey, plaintiff Todd's salary is also based on the ATC Level classification of the Albuquerque Center due to the "NATCA agreement" with the FAA. (Pls.' Opp'n Ex. 2.)

pleadings, this Court DENIES defendants' Motion to Dismiss as to plaintiff Todd.

Plaintiff Todd sued the FAA in the United States Court of Federal Claims, on behalf of the non-bargaining unit employees at the Albuquerque Center, seeking back pay as third-party beneficiaries of the contracts, including the CBA, between the FAA and NATCA under the Tucker Act, 28 U.S.C. § 1491. *Todd v. United States,* 56 Fed. Cl. 449, 450 (Fed.Cl.2003), *aff'd* 386 F.3d 1091 (Fed.Cir.2004). The claim was dismissed by the Court of Federal Claims because the contract did not state that the Albuquerque Center would be upgraded to ATC Level 11, thus guaranteeing plaintiffs a salary increase, and because the plaintiffs did not follow the established grievance procedure set in the contract to which they were claiming third party beneficiary status. *Todd,* 56 Fed. Cl. at 453. The decision of the Court of Federal Claims was affirmed by the Federal Circuit. *Todd v. United States,* 386 F.3d 1091 (Fed.Cir.2004). Plaintiff Todd alleges that he attempted to file a grievance related to the FAA's ATC Level classification of the Albuquerque Center through the personnel office and with the facility manager at the Albuquerque Center. (Pls.' Opp'n 7, Ex. 13.) The facility manager allegedly told plaintiff Todd that she did have the authority to act on such a grievance and that she would not file any appeal as to the classification of the Albuquerque Center. (*Id.*) Plaintiff Todd then called the Merit Systems Protection Board in Denver seeking review of the ATC Level classification and the person to

whom he spoke told him that the Board would not pursue his grievance. (Pls.' Opp'n Ex. 10.)

Our Circuit requires that a party exhaust the administrative remedies available to it in a labor dispute before an action can be brought in District Court. *Steadman v. United States Soldiers' and Airmen's Home,* 918 F.2d 963, 968 (D.C.Cir.1990); *Convertino v. United States Dept. of Justice,* 393 F.Supp.2d 42, 45 (D.D.C.2005) (finding that the exhaustion requirement helps prevent the interruption of the administrative process, allows the administrative agency to exercise its expertise, and promotes judicial efficiency). Our Circuit also requires that a claim be decided on the merits before it will be precluded by either collateral estoppel (issue preclusion) or res judicata (claim preclusion). *Stanton v. D.C. Ct. of Appeals,* 127 F.3d 72, 76 (D.C.Cir.1997).

In this case, the defendants have neither stated explicitly how plaintiff Todd has failed to exhaust the administrative remedies available to him, nor do the defendants counter plaintiff Todd's allegations that he did seek administrative remedies. Moreover, the record does not show that he failed to do so.[6] And, the

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[6] Plaintiff Todd has alleged that he sought to exhaust his administrative remedies through the Albuquerque Center's personnel office, its Facility Manager and the local Merit Systems Protection Board since he is not a bargaining unit employee under the NATCA/FAA CBA. (*See* Pls.' Opp'n 7, Ex. 10, Ex. 13.)

(Continued on following page)

fact that plaintiff Todd previously brought a claim against the United States in the Court of Federal Claims pertaining to the ATC Level classification of the Albuquerque Center and its effect on his compensation does not necessarily bar him from bringing this action since his earlier action was not decided on the merits and was dismissed for lack of subject matter jurisdiction under the Tucker Act. *See Todd v. United States,* 56 Fed. Cl. 449 (Fed.Cl.2003), *aff'd* 386 F.3d 1091 (Fed.Cir.2004); *Stanton,* 127 F.3d at 76. Therefore, after reviewing the pleadings, the Court DENIES defendants' Motion to Dismiss as to plaintiff Todd.

CONCLUSION

For the foregoing reasons, this Court GRANTS with prejudice Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction as to Plaintiffs Filebark and Havens and DENIES Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction as to Plaintiff Todd. An Order consistent with this ruling accompanies this Memorandum Opinion.

It should be noted that the defendants have failed to file the administrative record in this action as ordered by the Court, *see* Civil Action No. 03-1685, Minute Order dated December 7, 2004, even taking into account any applicable extensions of time granted by this Court.

ORDER

For the reasons set forth above, it is this *23rd* day of February, 2006 hereby

ORDERED that the Defendants' Motion to Dismiss is **GRANTED** with prejudice as to Plaintiffs Filebark and Havens, and it is further

ORDERED that the Defendants' Motion to Dismiss is **DENIED** as to Plaintiff Todd, and it is further

ORDERED that defendants file the administrative record as to Plaintiff Todd within 10 days of this order.

SO ORDERED.

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542 F.Supp.2d 1

United States District Court,
District of Columbia.
FILEBARK, et al., Plaintiffs,
v.
U.S. DEPARTMENT OF TRANSPORTATION, et al., Defendants.
Civil No. 03-1685(RJL).

March 31, 2008.

George Michael Chuzi, Kalijarvi, Chuzi & Newman, Washington, DC, for Plaintiffs.

Beverly Maria Russell, U.S. Attorney's Office for DC, Washington, DC, for Defendants.

MEMORANDUM OPINION

RICHARD J. LEON, District Judge.

Jerry Todd ("Todd") and Richard S. Boatman ("Boatman") ("plaintiffs"), Air Traffic Control Supervisors at the Albuquerque, New Mexico Air Traffic Control Center ("Albuquerque Center" or "Center"), brought this action against the Federal Aviation Administration ("FAA") and the United States Department of Transportation ("DOT") ("defendants") seeking, in essence, a reversal of the FAA's decision regarding the air traffic control classification of the Albuquerque Center. On February 23, 2006, the Court granted in part and denied in part defendants' motion to

dismiss.[1] Both parties filed motions for reconsideration, which the Court denied via separate Minute Orders on December 19, 2006. Now before the Court are Defendants' Motion to Dismiss, or Alternatively, for Summary Judgment (Dkt.# 71) ("Defs. Mot."); Plaintiffs' Cross-Motion for Summary Judgment and Opposition to Defendants' Motion to Dismiss or for Summary Judgment (Dkt. # 74) ("Pls. Cross-Mot."); and Plaintiffs' Motion to Include Additional Materials (Dkt. # 75). Upon consideration of the briefs, the relevant law and the entire record herein, the Court GRANTS defendants' motion to dismiss and DENIES plaintiffs' cross-motion for summary judgment.[2]

BACKGROUND[3]

Pursuant to the Administrative Procedures Act ("APA"), plaintiffs seek judicial review of the FAA's

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[1] In its February 23, 2006 Memorandum Opinion, the Court dismissed plaintiffs Joseph J. Filebark II and John J. Havens II but permitted the suit by plaintiff Todd to go forward on the grounds that defendants had not demonstrated on the record then before the Court that Todd had failed to exhaust his administrative remedies. *Filebark v. U.S. Dep't of Transp.*, 468 F.Supp.2d 3, 7 (D.D.C.2006). The remaining plaintiffs are Todd and Boatman. The Court granted Boatman's motion to intervene on December 19, 2006 via Minute Order.

[2] In light of the Court's determination that is [sic] lacks jurisdiction, it DENIES as moot Plaintiffs' Motion to Include Additional Materials.

[3] The parties agree that the material facts are undisputed, but that the legal significance of those facts remains disputed.

decisions to deny the Albuquerque Center's requests to upgrade its classification from an air traffic control ("ATC") Level 10 to an ATC Level 11. Ultimately, plaintiffs want the FAA to pay them the higher salary associated with working at an air traffic control center classified as an ATC Level 11. For the following reasons, the Court will not reverse the FAA's classification decision.

A. General Background

The Department of Transportation Appropriations Act of 1996, Pub.L. No. 104-50, § 347, 109 Stat. 436 (1995), as amended by Pub.L. No. 104-122, § 1, 110 Stat. 876 (1996) ("DOT Act")[4] directed the FAA Administrator to develop and implement a new personnel management system, which would put into effect a new compensation and classification system that would classify FAA facilities and determine the pay of the FAA workers at those facilities. *Filebark v. U.S. Dep't of Transp.*, 468 F.Supp.2d 3, 4 n. 2 (D.D.C.2006) (Leon, J.) (citing 49 U.S.C. § 40122(g)). Congress directed that the "new system shall, at a minimum, provide for greater flexibility in the hiring, training, compensation, and location of personnel." 49 U.S.C. § 40122(g)(1). Pursuant to this authorization, the FAA implemented the FAA Personnel

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[4] For ease of reference, the Court will use the term "DOT Act" to refer to not only the statute cited above, but also to any subsequent amendments, which have collectively been codified at 49 U.S.C. § 40122.

Management System ("PMS") in March 1996. (*See generally* A.R. 2-31.) The PMS anticipated that the FAA and the National Air Traffic Controller Association ("NATCA") would continue working together to devise a compensation plan "that values job complexity and compensates the employees based on level of work performance." (A.R. 14.)

In July 1998, the FAA and NATCA reached an agreement on the new compensation system.[5] (A.R. 133.) This system would transition the FAA from the GS system to the air traffic control ("ATC") system: the Position Classification Standard for Air Traffic Control Series ATC-2152 Terminal and En Route ("PCS").[6] (A.R. 136-204.) The PCS categorizes facilities based on traffic count, with classification levels ("ATC Level") ranging from ATC Level 3-12. (A.R. 313.) The FAA then compensates employees according to the ATC Level assigned to the facility at which they are employed. ATC Levels are assigned using a Classification Index ("CI"), which is calculated based

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[5] Although the pay agreements between the FAA and NATCA do not encompass supervisors, such as plaintiffs here, the FAA notified its employees that it had decided to extend the agreements with the NATCA to supervisory employees. (A.R. 32-33.)

[6] The parties dispute whether the July 1998 PCS or the January 1999 PCS (A.R. 136-204) constitutes a final version of the compensation plan. The dispute is only relevant for determining whether the appropriate break point between a Level 10 facility and a Level 11 facility is 1200 or 1250. Since the Court does not have jurisdiction to reach the merits, resolution of this dispute is unnecessary.

on various factors, including traffic volume. *See Todd v. United States,* 56 Fed.Cl. 449, 450 (Fed.Cl.2003), *aff'd* 386 F.3d 1091 (Fed.Cir.2004); *see also* A.R. 313. The methodology for computing the CI is set forth in the PCS. (A.R. 180-81.) The FAA uses a software program, called Enroute Track Analysis Program or ETAP, to calculate traffic counts used to generate the CI. *See Todd,* 56 Fed.Cl. at 450-51. The CI required for a particular ATC Level is based on "break points" established by the FAA and NATCA.[7]

Recognizing that a facility's air traffic count might change over time, the PCS provides general

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[7] Despite reaching an agreement, the parties acknowledged that further work was required to implement the PCS. They memorialized their intent to continue working in a July 8, 1998 Memorandum of Understanding with Respect to Reclassification and Associated Pay Rules ("July 1998 MOU") and a July 9, 1998 Principal Memorandum of Agreement Between the National Air Traffic Controllers Association and the Federal Aviation Administration ("July 1998 MO A"). (*See generally* A.R. 311-27; *see* A.R. 316, 325 ("The parties have made a good faith effort to devise a new pay system consistent with the agreement on additional funds to be made available in each of the first three fiscal years of the life of the new collective bargaining agreement. The parties recognize, however, that certain variables are sufficiently complex that the fiscal year mark will likely not be met precisely.").) Although the FAA transitioned to the ATC pay system in October 1998, the FAA/NATCA Reclassification Team ("Reclassification Team") continued to work on the new classification system. Updates provided by the Reclassification Team noted that the classification process was ongoing, and due to additional data collection, the previously-distributed facility grades might change. (A.R. 133.) To mitigate any impact, they noted that the break points might need to be adjusted. (A.R. 134.)

guidelines for a facility to request an ATC Level upgrade. (*See* A.R. 193.) The FAA and NATCA refined the procedures for obtaining a facility upgrade in a November 15, 1999 Memorandum of Understanding with Respect to Reclassification and Associated Pay Rules Between the National Air Traffic Controllers Association and the Federal Aviation Administration ("November 1999 MOU"). (A.R. 205-08.) The November 1999 MOU delineates seven requirements a facility must meet to obtain an upgrade, including providing the facility's traffic count and CI calculation. (A.R. 206.) The final requirement is that "[t]he data will be validated at the Regional and/or National Level." (*Id.*)

If an employee or facility wishes to challenge a classification decision, the PCS delineates an Appeal Process to seek review of "[t]he way in which the classification standard is interpreted or applied at a specific facility." (A.R. 194). Pursuant to the Appeal Process, an individual employee may initiate an appeal, but only the Facility Manager and the NATCA Facility Representative are authorized to file the appeal. (*Id.*) Upon receipt of an appeal, a Classification Appeal Review Committee ("CARC"), consisting of a NATCA representative and an Air Traffic Management Representative, will be established; it will issue a written statement of findings within sixty days. (*Id.*) This decision is final and binding; no further appeal is permitted. (A.R. 195.) To the extent the CARC cannot reach a mutual decision, an appeal

may be taken to the Classification Appeals Board ("CAB"). (*Id.*)

B. Albuquerque Center's Upgrade Requests

The FAA originally assigned the Albuquerque Center an ATC Level 10. The Albuquerque Center, however, has repeatedly requested an upgrade to an ATC Level 11. The Center's air traffic manager, Joan Mallen, initiated the Center's first upgrade request on June 7, 2000.[8] (A.R. 302-04.) Although the request acknowledged that the Center's current CI was below the Level 11 break point, it attributed that to the erroneous exclusion of some Special Use Airspace traffic, such as military operations. (A.R. 302.) On September 6, the air traffic manager sent a complete application for an upgrade, which also requested "assistance in validating this data" pursuant to the terms of the November 1999 MOU. (A.R. 306-08, 308.)

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[8] Plaintiffs' Amended Complaint and Cross-Motion assert that since the Albuquerque Center's initial classification, the FAA has erroneously classified the Center as an ATC Level 10. This assertion is based, in part, on their contention that the FAA applied an incorrect break point and that ETAP did not count certain special use airspace traffic, such as military traffic. (*See, e.g.*, Pls. Cross-Mot. 8 & n. 5; Am. Compl. ¶ 22.) Although plaintiffs argue that the initial classification was incorrect, they do not challenge any agency decision relating to this determination.

The FAA denied Albuquerque Center's request on October 17, 2000. (A.R. 209.) It noted that until it completed the validation of ETAP, it would not run a CI for classification purposes. (*Id.*) The FAA also pointed out that the current year of traffic data on file indicated that the Center had not met the requirements for an upgrade. (*Id.*) The Albuquerque Center was encouraged to submit a new upgrade request once the ETAP validation was complete and it met the upgrade requirements. (*Id.*)

Subsequently, Todd, in his capacity as an Air Traffic Control Supervisor, sought to initiate an appeal of the FAA's decision. The Albuquerque Center's Facility Manager, Joan Mallen, declined to file the appeal. (Pls. Opp'n to Mot. to Dismiss [Dkt. # 27], Ex. 13, ¶ 11.) Undeterred, Todd also tried to lodge a complaint with the Merit Systems Protection Board ("MSPB"), but they declined to accept the grievance. (*Id.* ¶ 13.)

In 2001, however, the Albuquerque Center requested another upgrade. As part of this request, the National Validation Team ("NVT") conducted an audit of the Center in July 2001.[9] (A.R. 265-300.) The NVT determined that "the facility has experienced adaptation problems between the HOST computer and ETAP

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[9] Plaintiffs assert that the version of ETAP in use during the summer of 2001 still did not count military traffic and also did not calculate the CI based on the appropriate number of hours, in violation of the PCS requirements for calculating a facility's CI.

that had an impact on the facilities (sic) classification index." (A.R. 265.) Once the adaptation problems were corrected during the validation process, the Center's CI was below the required breakpoint. (*Id.*) As a result, the Albuquerque Center's upgrade request was denied on September 26, 2001. (*Id.*)

In the interim, plaintiff Todd had filed a contract claim in the Court of Federal Claims in July 2001, seeking back pay on the grounds that the FAA's refusal to upgrade the Albuquerque Center's ATC Level violated the collective bargaining agreement between the FAA and the NATCA. *See generally Todd v. United States,* 56 Fed.Cl. 449 (Fed.Cl.2003), *aff'd,* 386 F.3d 1091 (Fed.Cir.2004). The Federal Circuit upheld the dismissal of that case on October 5, 2004. *See Todd v. United States,* 386 F.3d 1091 (Fed.Cir.2004). Shortly thereafter, on December 22, 2004, plaintiffs sought leave to file an Amended Complaint adding Todd as a plaintiff to this action, but still seeking judicial review of the FAA's classification upgrade decisions.

DISCUSSION

I. Standard of Review

Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of a complaint for lack of subject matter jurisdiction. Under Rule 12(b)(1), "the plaintiff bears the burden of establishing the factual predicates of jurisdiction by a preponderance of the evidence." *Lindsey v. United States,* 448 F.Supp.2d 37, 42

(D.D.C.2006) (quoting *Erby v. United States*, 424 F.Supp.2d 180, 182 (D.D.C.2006)). "The [C]ourt, in turn, has an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority." *Id.* at 42-43 (alteration in original) (quoting *Abu Ali v. Gonzales*, 387 F.Supp.2d 16, 17 (D.D.C.2005)).

II. The Department of Transportation Appropriations Act of 1996 Precludes Judicial Review of the FAA's Facility Classification

The FAA challenges the Court's jurisdiction on the grounds that judicial review of plaintiffs' APA claims is precluded by the DOT Act.[10] Plaintiffs assert

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[10] Plaintiffs claim that the law of the case doctrine bars the FAA from asserting its jurisdictional arguments because the Court's denial of the FAA's original motion to dismiss and motion to alter or amend judgment implicitly rejected those arguments. (*See* Pls. Cross-Mot. 23-26.) I disagree. The law of the case doctrine embodies "the general concept that a court involved in later phases of a lawsuit should not re-open questions decided (i.e., established as the law of the case) by that court or a higher one in earlier phases." *Crocker v. Piedmont Aviation*, 49 F.3d 735, 739 (D.C.Cir.1995). The doctrine is prudential, not jurisdictional. *See id.* at 739-40. This applies to issues decided explicitly or by necessary implication. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1394 (D.C.Cir.1996) (*en banc*). Although our Circuit Court has rejected a subject matter jurisdiction exception to the doctrine, it also recognizes that it is a prudential doctrine. *See id.* at 1393-94. If the initial decision was "clearly erroneous and would work a manifest injustice," reconsideration is permissible. *See id.* at 1383 (citations and internal quotations omitted). In its prior Memorandum Opinion, the Court explicitly stated its understanding that defendants were moving to dismiss plaintiff Todd's claim "because he failed to exhaust his

(Continued on following page)

that their claims are properly brought pursuant to the APA since the upgrade decisions constitute a final agency action for which there is no other remedy in court.[11] (Pls. Opp'n to Mot. to Dismiss [Dkt. # 27] 12 (citing 5 U.S.C. § 704).) They contend that the case law regarding the preclusive effect of the Civil Service Reform Act ("CSRA") is irrelevant because the FAA is exempt from that statute, and the PMS does not provide comparable recourse. (*Id.* at 10-11.) The FAA,

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administrative remedies and because he already brought an action in the Court of Federal Claims regarding the same issue." *Filebark v. U.S. Dep't of Transp.*, 468 F.Supp.2d 3, 7 (D.D.C.2006). It did not believe that defendants' § 701(a) arguments were made as to plaintiff Todd. Additionally, the pleadings with regard to Defendants' Motion to Alter or Amend Judgment purported to argue that the court lacked jurisdiction over classification decisions because they were committed to agency discretion. Although both parties sprinkled variations of the word "preclude" into their briefing on the Motion to Alter or Amend Judgment, it was far from apparent to the Court that they were making arguments as to whether the Court lacked jurisdiction because a statute precluded judicial review pursuant to § 701(a)(1), as opposed to because the matter was committed to agency discretion pursuant to § 701(a)(2). Any confusion stemmed from the parties' lack of clarity regarding their arguments. Now that it is clear that defendants argue the Court lacks jurisdiction pursuant to § 701(a)(1), as well as § 701(a)(2), it is apparent that failing to consider this argument would, for the reasons *infra*, be erroneous and work a manifest injustice. Thus, addressing this argument is not inconsistent with the law of the case doctrine.

[11] In support of their contention that the challenged agency actions are subject to judicial review, plaintiffs rely exclusively on their papers filed in conjunction with the prior motion to dismiss and motion for reconsideration. (Pls.Cross-Mot. 25-26.)

on the other hand, argues that the PMS provides the exclusive remedies for challenging FAA personnel actions. It supports its argument by comparing the PMS, which it implemented pursuant to § 347 of the DOT Act, to the CSRA, which courts have routinely held to preclude judicial review. (Defs.Mot.16-22.) For the following reasons, I agree with the defendants.

The APA "embodies the basic presumption of judicial review." *Abbott Labs. v. Gardner,* 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Specifically, "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. The APA limits review, however, where "statutes preclude judicial review" or where "agency action is committed to agency discretion by law." *Id.* § 701(a)(1), (2). Absent an express statutory prohibition of judicial review, courts require a showing of "clear and convincing" legislative intent to preclude judicial review. *See Abbott Labs.,* 387 U.S. at 141, 87 S.Ct. 1507. "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Comty. Nutrition Inst.,* 467 U.S. 340, 345, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984); *see also United States v. Fausto,* 484 U.S. 439, 443-44, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988) ("examining the purpose of the [statute], the entirety of its text, and the structure of review that

it establishes" to determine whether it precludes judicial review). An analysis of the DOT Act and the subsequent PMS and PCS illustrate Congress' clear intent to limit judicial review of FAA personnel decisions to what is explicitly provided.

Congress enacted the DOT Act "to give the FAA the opportunity to replace standing regulations with its own specific personnel management system" that would address the "unique demands" of the FAA's workforce. *See Fed. Air Marshals v. United States,* 74 Fed.Cl. 484, 487 (Fed.Cl.2006). To permit the FAA to create its own personnel management system that would "provide for greater flexibility in the hiring, training, compensation, and location of personnel," the DOT Act exempted the FAA from most federal personnel laws, including many provisions of the Civil Service Reform Act. *See* 49 U.S.C. § 40122(g)(1); *see also* H.R.Rep. No. 104-475(I) (1996), *available at* 1996 WL 108579, *31 (DOT Act "deal[s] with these problems by giving the agency the flexibility to develop its own procurement and personnel systems best suited to its unique mission. . . . by exempting the agency from current . . . personnel laws that hinder its flexibility"). The Civil Service Reform Act, Pub.L. No. 95-454, 92 Stat. 111 (codified, as amended, in scattered sections of 5 U.S.C.) ("CSRA"), is "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Fausto,* 484 U.S. at 445, 108 S.Ct. 668. Despite the FAA's

general exemption from the CSRA and other federal personnel laws, Congress specifically maintained the applicability of certain "existing laws on whistleblower protection, prohibiting strikes, prohibiting discrimination and those laws relating to suitability, security, conduct, workmen's compensation, unemployment compensation, retirement, labor-management relations, life insurance, and health insurance." H.R.Rep. No. 104-475(I), *available at* 1996 WL 108579 at *40. In fact, Congress amended the statute in 2000 to give FAA employees the right to petition the Merit Systems Protection Board in connection with major adverse personnel actions related to whistleblowing. *See* Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub.L. No. 106-181, § 308, 114 Stat. 61 (2000).

Exercising the discretion afforded it by Congress, the FAA implemented the PMS, which, along with the DOT Act, governs FAA personnel. In doing so, it chose to make additional federal personnel laws applicable to the FAA, (A.R. 3 (exercising discretion to have certain sections of Title 5 applicable to FAA)), and it established its own grievance and appeal procedures,[12] (A.R. 22-26). Moreover, when the FAA

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[12] The PMS also provides additional procedural protections akin to protections provided for by the CSRA. For example, both the PMS and CSRA guarantee employees written notice of adverse personnel actions, such as removal, with an opportunity to respond. *Compare* A.R. 20-22 (FAA PMS Ch. III, ¶ (g)-(q)), *with* 5 U.S.C. § 4303(b).

implemented the PCS pursuant to the PMS, it instituted an Appeal Process for facility classification decisions. (A.R. 194-95.) Those procedures, however, do not provide judicial review for agency decisions regarding facility upgrade requests.

Indeed, allowing plaintiffs' claims to proceed here would undermine Congress' clear intent to the contrary. Congress exempted the FAA from the CSRA to give the FAA as much flexibility as possible in developing its own personnel management system. Permitting judicial review of personnel decisions that neither Congress, nor the FAA, elected to subject to judicial review would thwart that flexibility. Not surprisingly, the Fifth Circuit reached a similar conclusion in *McAuliffe v. Rice,* 966 F.2d 979 (5th Cir.1992).

In *McAuliffe,* the Fifth Circuit faced an APA claim by an employee of a nonappropriated funded instrumentality ("NAFI"), run by the Air Force, challenging her termination. Congress had exempted NAFIs from the CSRA to provide them with program flexibility. *See id.* at 979. In holding that the action was precluded, the Fifth Circuit explained that since Congress "deliberately exempted NAFI employee" from the CSRA to give them "the maximum possible personnel flexibility," requiring judicial review of those decisions "thwarts the goal of maintaining flexibility." *See id.* at 980-81.

Moreover, the comprehensive personnel system established by the DOT Act and the PMS supports the finding that judicial review is precluded here.

Courts have recognized that the comprehensiveness of the CSRA demonstrates Congress' intent for the CSRA to provide the exclusive remedies for agency personnel actions. Accordingly, absent a provision for judicial review in the CSRA, challenges to agency personnel actions cannot be pursued via other statutes, like the APA. *See Fausto,* 484 U.S. at 455, 108 S.Ct. 668 (holding that Congress' establishment of a "comprehensive system for reviewing personnel action" judicial review if the statute excludes an employee from those provisions); *see also Graham v. Dep't of Justice,* No. 02-1231, 2002 WL 32511002, *2 (D.D.C. Nov.20, 2002) ("The law is well-settled that the CSRA displaces all other bases for judicial review of personnel actions taken against federal employees, including the APA."), *aff'd Graham v. Ashcroft,* 358 F.3d 931 (D.C.Cir.2004); *Forrey v. Office of Pers. Mgmt.,* 70 F.3d 1271, 1995 WL 696901 *1 (6th Cir.1995) (unpublished table) (upholding determination that Congress did not intend that judicial review be available pursuant to the APA after enactment of the CSRA because "the [FAA's] classification decision [of an employee's position based on the density of air traffic handled in the Cleveland region] was discretionary and therefore not subject to judicial review").

It has also been observed by various courts that the principles regarding the CSRA's exclusivity in providing remedies "appl[y] even where the federal employee in question is not covered by the CSRA at all," as is the case with the plaintiffs here. *See Graham,* 2002 WL 32511002 at *3, n. 1 (citing

McAuliffe v. Rice, 966 F.2d 979 (5th Cir.1992)); *see also Croddy v. FBI,* No. 00-0651, 2006 WL 2844261 (D.D.C. Sept.29, 2006) (holding that the CSRA precluded judicial review of FBI personnel actions within the ambit of the CSRA even though FBI is exempt from CSRA). The DOT Act was intended to supplant the CSRA and permit the creation of a personnel management system specifically designed for and by the FAA. Where Congress wanted to guarantee certain remedies, it explicitly did so. Thus, by providing the FAA with the discretion and flexibility to create its own personnel management system, Congress intended that resulting system to constitute the entire personnel system.

That the statutory scheme specifically provides for judicial review of certain other limited agency actions also suggests Congress' intent to preclude judicial review here. For example, Congress specified in the statute that employees have the ability to ultimately seek judicial review of an adverse ruling regarding a "major adverse personnel action." *See* 42 U.S.C. § 40122(h) (permitting review of "major adverse personnel action" through the FAA's Guaranteed Fair Treatment procedures); A.R. 24-26 (FAA Guaranteed Fair Treatment procedures ultimately permit an employee to seek judicial review). These "major adverse personnel actions" include "a suspension of more than 14 days, a reduction in pay or grade, a removal for conduct or performance, a non-disciplinary removal, a furlough of 30 days or less . . . or a reduction in force action." 42 U.S.C. § 40122(j).

Similarly, the DOT Act also provides for judicial review of certain challenges to "prohibited personnel practices" under "section 2302(b), relating to whistleblower protection." 49 U.S.C. § 40122(g)(2)(A). By contrast, neither the DOT Act nor the PMS provide the same review process to employees challenging "classification decisions." Indeed, the parties do not dispute this, and to the extent an upgrade classification decision could be considered in theory a "prohibited personnel practice" under the CSRA (*i.e.*, denying an employee equal pay for equal work), Congress did not provide for the possibility of judicial review for "prohibited personnel practices" in general, only prohibited personnel actions relating to whistleblowers. 49 U.S.C. § 40122(g)(2)(A). Thus, Congress left to the discretion of the FAA how to review erroneous classification decisions. And the FAA decided to limit the process to the Appeal Process set forth in the PCS, which does not contemplate judicial review. (A.R. 194-95.) Thus, for this Court to allow plaintiffs to proceed with judicial review here would "turn the review structure of the [DOT Act] on its head."[13] *See*

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[13] Plaintiffs contend that the case law concerning the preclusive effect of the CSRA is inapplicable here because the employees in those cases had adequate procedural protections, which the plaintiffs lack here. (Pls. Opp'n to Mot. to Dismiss [Dkt. # 27] 11-12.) Although plaintiffs assert that access to the MSPB and Office of Special Counsel was the "linchpin" in *Gray v. Office of Personnel Management*, 771 F.2d 1504 (D.C.Cir.1985), and *Carducci v. Regan*, 714 F.2d 171 (D.C.Cir.1983), the availability of other remedies was only one factor the Circuit Court considered. The Circuit Court also placed emphasis on not

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Ryon v. O'Neill, 894 F.2d 199, 203 (6th Cir.1990); *see also McAuliffe v. Rice,* 966 F.2d 979, 981 (5th Cir.1992).

Thus, in light of Congress' clear intent, the purpose and structure of the DOT Act limits judicial review for FAA employees to those explicitly provided for in the statute and accompanying procedures. Accordingly, since that is not the case here, the Court lacks jurisdiction to entertain plaintiffs' APA claims. Accordingly, in light of Congress' clear intent, the Court lacks jurisdiction to entertain plaintiffs' APA claims, and must GRANT defendants' motion to dismiss. An appropriate Order consistent with this ruling accompanies this Memorandum Opinion.

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conferring greater rights to employees than provided for by Congress. *See Gray,* 771 F.2d at 1510-11; *cf. Carducci,* 714 F.2d at 175 (acknowledging that its ruling would render some limited number of minor personnel actions reviewable by neither the Office of Special Counsel nor the courts); *Graham,* 358 F.3d at 935 ("'[I]t is the comprehensiveness of the statutory scheme involved, not the "adequacy" of specific remedies thereunder, that counsels judicial abstention.'" (quoting *Spagnola v. Mathis,* 859 F.2d 223, 227 (D.C.Cir.1988) (*en banc*)).). It bears noting, however, that plaintiffs do have some recourse through their facility manager, even if they deem that recourse unsatisfactory. *Cf. Stella v. Mineta,* 284 F.3d 135, 142-43 (D.C.Cir.2002) (observing that prior to 2000 amendment to DOT Act granting FAA employees access to enforcement and investigation provisions for whistleblower actions, FAA employees' recourse for whistleblowing reprisals was solely within the FAA's PMS procedures).

56 Fed.Cl. 449

United States Court of Federal Claims.
Jerry TODD, et al., Plaintiffs,
v.
UNITED STATES of America, Defendant.
No. 01-409C.

May 5, 2003.

George M. Chuzi, Kalijarvi, Chuzi & Newman, P.C., Washington, DC, for plaintiffs.

Thomas D. Dinackus, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Peter J. Hannums, Federal Aviation Administration, Washington, DC, of counsel.

OPINION AND ORDER

HODGES, Judge.

Plaintiffs are managers and supervisors who seek back pay as third-party beneficiaries of a contract negotiated by the Federal Aviation Administration and the National Air Traffic Controllers Association. The Government has not disputed plaintiffs' alleged third-party beneficiary status until now. *See Todd v. United States,* Hearing Tr. at 20, No. 01-409C (Fed.Cl. May 15, 2003).[1] "The Government has never

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[1] "Are you concerned at all about the fact that these plaintiffs are not members of the union [that] negotiated this deal to start with?

(Continued on following page)

conceded that plaintiffs are third-party beneficiaries, such that the CBA could provide jurisdiction for this Court to entertain this suit." Brief in Response to Court Order, p. 10, n. 9 (April 29, 2003). Defendant also contends now that "[a] third party cannot be made a third party beneficiary of a contract by the post-hoc unilateral act of one of the signatories to the contract." (citation omitted).

Plaintiffs argue that agreements and memoranda of understanding between the Federal Aviation Administration and the National Air Traffic Controllers Association entitle them to higher salaries. The agreements govern classification of FAA facilities and establish procedures for reclassifying facilities according to air traffic volume.

Defendant stated at a hearing last year that Albuquerque Center was a Level 10 facility, and that its traffic volume was well below the "break point" for Level 11 classification. After that hearing, the parties assured the court repeatedly that they would settle. We granted many extensions based on those representations, and the case is now nearly two years old.

"Probably not. . . . It appears that even though these individuals were not members of the union, it was understood that they would be, in a sense, a beneficiary of the union agreement because they work in the same facility as the people who are covered by the union agreement.

"And there was intent that they be benefitted?

"Correct."

The Government raised subject matter jurisdiction for the first time in March of this year. Defendant made little mention of jurisdiction during the hearing last year or in the Answer filed October 2001.

BACKGROUND

Congress authorized the Administrator of the Federal Aviation Administration in 1995 to develop a new Personnel Management System to supplant the compensation and classification system then in effect. *See* 49 U.S.C. § 40122(g).[2] The Personnel Management System is exempt from Title 5 of the United States Code with several exceptions.[3]

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[2] Personnel management system –

[T]he Administrator shall develop and implement, not later than January 1, 1996, a personnel management system for the [Federal Aviation] Administration that addresses the unique demands of the agency's workforce. Such a new system shall, at a minimum, provide for greater flexibility in the hiring, training, compensation, and location of personnel. 49 U.S.C. § 40122(g)(1).

[3] Applicability of title 5. –

The provisions of title 5 shall not apply to the new personnel management system developed and implemented pursuant to paragraph (1), with the exception of –

. . . .

(H) sections . . . relating to the Merit Systems Protection Board. 49 U.S.C. § 40122(g)(2).

The FAA classifies air traffic control facilities according to the amount of traffic that passes through the facilities' air space. The Personnel Management System compensates employees of a facility based on its Classification Index. The FAA and the National Air Traffic Controllers Association negotiated the system for classifying air traffic volume and for compensating employees.

FAA issued classification standards adopting the negotiated system in January 1999, including a formula for counting civilian and military aviation traffic. The System uses a formula to make traffic counts and to assign appropriate levels to FAA facilities. The FAA calculates traffic counts with software known as ETAP. The Classification System assigned the Albuquerque Traffic Control Center a Level 10 (ATC-10) in 1998. This assignment was based on a traffic count of less than 1250, which is considered the break point for reclassification.

Albuquerque Center notified FAA after the ATC-10 assignment in 1998 that ETAP did not account for military traffic handled by the Center, as the Classification Standards require. The FAA released a new version of ETAP in June 1999.

The FAA and NATCA negotiated a Memorandum of Understanding in November 1999, to determine when facilities would be upgraded based on their traffic counts. The qualification procedure is an eight-step process that requires data submitted by the facility to be "validated at the Regional and/or

National Level." *See* Memorandum of Understanding, November 15, 1999.

Albuquerque Center issued a memorandum to the FAA in September 2000 stating that using the new software, it had met the criteria for an upgrade to ATC-11. The data were based on traffic counts for June, July, and August of that year. The FAA responded that it could not validate Albuquerque Center's data. FAA released two newer versions of the software the following year, and it has allowed Albuquerque to augment the traffic count manually since then.

Plaintiffs' arguments suggested uncertain or alternative legal theories, so we asked plaintiffs to file the documents that support jurisdiction in this court.[4] It was clear after the March 20 hearing that plaintiffs are claiming an express contract with the United States.

DISCUSSION

A.

The Tucker Act grants this court jurisdiction over actions "founded either upon the Constitution, or any

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[4] One reason that we have had trouble understanding plaintiffs' theory of this case is that they rely entirely on breach of an expressed contract. Traditional breach damages should give them sufficient relief if they could make the necessary showing. Most of plaintiffs' arguments seem to rely on back pay provisions on the collective bargaining agreements.

Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491. The Tucker Act is a jurisdictional statute; plaintiffs must show that a substantive right exists elsewhere, such as in a contract or money-mandating statute or regulation. *See United States v. Mitchell,* 463 U.S. 206, 216, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983); *United States v. Testan,* 424 U.S. 392, 398, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976).

"Federal employees do not have contractual relationships with the Government, barring an explicit agreement to the contrary." *Darden v. United States,* 18 Cl.Ct. 855, 859 (1989). Federal law governs collective bargaining agreements involving federal employees.

B.

The FAA Administrator issued an order in March 1996 "to implement a new personnel management system for the FAA that will be more efficient; cost less to operate; provide greater flexibility in the hiring, training, compensation, and location of FAA personnel; and, above all, be fundamentally fair." We asked plaintiffs to provide authority in the Personnel Management System for this court to review FAA's classification decision and to award them back pay. They cited Paragraph 9 of the PMS:

> Agency funds may be used to pay back pay to an FAA employee who, as the result of a decision or settlement under the FAA Grievance Procedure, a collective bargaining agreement, the FAA appeals procedure, or the Executive System Appeals Procedure is found by an appropriate authority to have been affected by an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due to the employee.

FAA Personnel Management System, Chapter II, Paragraph 9(a) (March 28, 1996). Paragraph 9 of the PMS is a counterpart to the statute that authorizes back pay for federal employees due to unjustified personnel actions. *See* 5 U.S.C. § 5596.[5] Title 49 U.S.C. § 40122(g)(2) excludes § 5596 from FAA's Personnel Management System ("The provisions of title 5 shall not apply to the new personnel management system . . . with the exception of [the Merit Systems Protection Board]").

Plaintiffs seek back pay on the basis that the Agency's refusal to upgrade Albuquerque Center to an

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[5] An employee of an agency who, on the basis of a timely appeal or an administrative determination . . . is found by an appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee 5 U.S.C. § 5596(b)(1).

ATC-11 facility was an unjustified or unwarranted personnel action under the collective bargaining agreement.[6] They also cite portions of the September 1998 Collective Bargaining Agreement between FAA and the National Air Traffic Control Association. The Back Pay section in Article 37 of the Agreement recognizes "the power of an appropriate authority to render a remedy in accordance with the provisions of 5 U.S.C. § 5596."

A November 1999 Memorandum of Understanding between the FAA and NATCA sets out procedures for upgrading the pay classification of a facility.[7] If a facility establishes that its traffic count warrants a higher classification, "the upgrade shall take effect the first full pay period after the third consecutive month the facility is at or above the breakpoint. . . . If the administrative process is unable to be completed to meet this time frame, the upgrade shall be retroactive to the first full pay period after the third

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[6] "Unjustified or unwarranted personnel action" includes an "act of commission or omission that an appropriate authority subsequently determines, on the basis of substantive or procedural defects, to have been unjustified or unwarranted under applicable law . . . or through a collective bargaining agreement." FAA Personnel Management System, Chapter II, Paragraph 9(c) (March 28, 1996).

[7] Defendant argues that the Memorandum of Understanding does not have legal effect because it was not incorporated into an agency directive. We did not find it necessary to address this point.

consecutive month the facility is at or above the break point."

Plaintiffs emphasize that this language is authority for granting them back pay for the difference between an ATC-10 and the ATC-11 classification to which they believe they are entitled. However, the FAA has not classified Albuquerque Center as an ATC-11 facility. Employees at a facility are entitled to an upgrade IF the facility establishes that its traffic count warrants a higher classification. The upgrade takes effect only then, retroactive to the first full pay period three months after it reached the break point. The FAA reviewed Albuquerque Center and determined in July 2001 that it did not warrant reclassification. Plaintiffs' claim for back-pay depends upon their showing either that Albuquerque Center had been upgraded to an ATC-11 facility, or that the Government had an obligation to assign Albuquerque an ATC-11 classification.

Mr. Tisdall is the FAA's Acting Division Manager. He helped draft the Classification Standards, and he established the break points as well. He was in charge of the team that analyzed Albuquerque Center's air traffic volume in July 2001 at the request of the Center. The team determined after a week of reviewing traffic volume statistics that Albuquerque

Center's Classification Index was below the 1250 break point.[8]

Government employees may not receive pay for positions to which they have not been appointed, regardless of their duties. *United States v. Testan,* 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). Plaintiffs in *Testan* sought a higher level of pay based on the duties that they performed. They sued to be reclassified at a pay grade that was commensurate with those duties. The Supreme Court stated that "Congress has not made available to a party wrongfully classified the remedy of money damages through retroactive classification." *Testan,* 424 U.S. at 403, 96 S.Ct. 948.

Plaintiffs ask the court to upgrade Albuquerque Center to ATC-11 for the same reason that plaintiffs sued in *Testan* – to qualify for higher pay. They seek money damages for positions to which they should have been appointed, but were not. We cannot address such a claim. *See, e.g., United States v. King,* 395 U.S. 1, 3, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969) (holding that jurisdiction of this court calls for "presently due money damages.").

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[8] Both parties speculated at a recent hearing that Albuquerque Center's numbers would reach 1250 by this summer. Mr. Tisdall has been reviewing the Center's data as a part of this litigation, however, and he concluded as of April 24, 2003 that Albuquerque would remain below the 1250 breakpoint.

CONCLUSION

Plaintiffs allege breach of a contract with the United States, which is a claim within this court's jurisdiction. The contract did not promise plaintiffs that Albuquerque Center would be upgraded to ATC-11, however. We do not have the authority to order FAA to make such a decision without a promise to do so. Moreover,

> plaintiff may not base his theory of recovery on contract law since he was a federal employee. Federal officials who by act or word generate expectations in the persons they employ, and then disappoint them, do not ipso facto create a contract liability running from the Federal Government to the employee, as they might if the employer were not the government.

Shaw v. United States, 226 Ct.Cl. 240, 640 F.2d 1254, 1260 (1981).

The contracts to which plaintiffs claim third-party beneficiary status establish a grievance process to protest a "major adverse action." Plaintiffs did not follow this grievance procedure. For that reason, we do not address whether FAA's classification ruling was grievable or whether it was a major adverse action. The collective bargaining agreement provides that its grievance procedure is "exclusive." Plaintiffs argue only breach of contract.

Plaintiffs have not stated a claim for which this court can grant relief. The Clerk will dismiss their complaint. No costs.

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386 F.3d 1091

United States Court of Appeals,
Federal Circuit.

Jerry TODD, Benjamin E. Abeyta, Christopher Blas Abeyta, Richard Acker, Larry Allred, David Lind Ausherman, Richard Severn Boatman, Russell T. Bowlin, Larry Allan Braaten, Linda Kaye Brown, William Duane Bryan, Jennifer Lee Ceithaml, Richard Chavez, Oliver Dallas, Larry David Duke, Brent Lee Eberhart, William J. Foley, Peter B. Fredrikson, William L. Gonzales, Modesto R. Gutierrez, Ray Martin Helman, Maurice Howland, Steven Gerard Kubala, Carol Ann Latham, Larry Layden, Terry L. Locke, Kent T. Mackenzie, Roger Anthony Mandeville, Joan M. Mallen, Dale E. McCabe, Joel D. McCoy, Donald E. McFarland, Holly L. Mings, James P. Morgan, David Carl Mott, Janet Louise Mould, Glen R. Nicolet, Phillip Charles Oliver, Terry Perez, Gary Clyde Perrin, Brenda Louise Perry, Gary Albert Postlewait, Andrew Paul Rankin, James M. Reeves, Larry Roy Rolls, Donald Alan Schlosser, Roger Craig Schlotterback, Jon Leslie Semanek, Librado Silva, Mark Spauling, Jeffrey L. Sproul, Richard Alan Sutton, Michael S. Szucs, Gregory Tingley, Richard Alan Underwood, Larry M. Utterback, Stephen Price Van Sickle, Deborah T. Vibbert, Lois J. Warwick, David Bruce Wingert, and Craig L. York,
Plaintiffs-Appellants,

v.

UNITED STATES, Defendant-Appellee.

No. 03-5120.

DECIDED: Oct. 5, 2004.

George M. Chuzi, Kalijarvi, Chuzi & Newman, P.C., of Washington, DC, argued for plaintiffs-appellants.

Thomas D. Dinackus, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were Peter D. Keisler, Assistant Attorney General; David M. Cohen, Director; and Brian M. Simkin, Assistant Director. Of counsel on the brief was Peter J. Hannums, Senior Attorney, Federal Aviation Administration, of Washington, DC.

William W. Osborne, Jr., Osborne Law Offices, P.C., of Washington, DC, for amici curiae.

Before MICHEL, Circuit Judge, ARCHER, Senior Circuit Judge, and RADER, Circuit Judge.

RADER, Circuit Judge.

Jerry Todd, et al. (collectively, appellants) appeal their claim against the United States for back pay, which claim the United States Court of Federal Claims dismissed for failure to state a claim upon which relief can be granted. *Todd v. United States*, 56 Fed.Cl. 449, 453 (2003). Because the Court of Federal Claims did not err in dismissing appellants' claims, this court affirms.

I.

Appellants are supervisors and managers at the Albuquerque Air Traffic Control Center (Albuquerque

Center) of the Federal Aviation Administration (FAA). Supervisors and managers receive compensation based, in part, on the volume and complexity of air traffic at the Albuquerque Center. The FAA evaluates this volume and complexity factor for each traffic control center and assigns each an ATC Classification Level. The FAA designated the Albuquerque Center as an ATC Classification Level 10 (ATC-10) facility in 1998. Appellants allege that an increase in air traffic at the Albuquerque Center during 1999 qualified the Albuquerque Center for designation as an ATC-11 facility.

The FAA entered into a September 1998 Collective Bargaining Agreement (CBA) and a November 1999 Memorandum of Understanding (MOU) with the National Air Traffic Control Association (Union). Appellants, as supervisors, are not members of the Union, but claim to be third party beneficiaries of the CBA and MOU. Appellants allege that the CBA and MOU obligated the FAA to reclassify the Albuquerque Center as an ATC-11 facility when the air traffic increased in 1999. Appellants further allege that the FAA breached the CBA and MOU by refusing to reclassify the Albuquerque Center.

An upgrade of the Albuquerque Center to an ATC-11 facility would give appellants a higher salary. Appellants brought the present suit seeking back pay, retroactive to June 1999, for the difference between their salary and benefits working at an ATC-10 facility and the salary and benefits at an ATC-11 facility.

The FAA, however, has not reclassified the Albuquerque Center as an ATC-11 facility.

II.

Appellants brought the present suit in the Court of Federal Claims under the Tucker Act. The Tucker Act grants the Court of Federal Claims jurisdiction over actions "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491 (2000). The jurisdiction of the Court of Federal Claims under the Tucker Act is "limited to actual, presently due money damages from the United States." *United States v. Testan,* 424 U.S. 392, 398, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976) (quoting *United States v. King,* 395 U.S. 1, 3, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969)). Thus, jurisdiction under the Tucker Act requires the litigant to identify a substantive right for money damages against the United States separate from the Tucker Act itself. *Id.*

Appellants argue that the FAA's alleged breach of the CBA and MOU with the Union supplies those substantive rights for money damages against the United States. Appellants are not, however, parties to either the CBA or the MOU. Consequently, appellants do not have a contract with the United States and cannot base a claim for money damages against the United States on a contract to which they are not a

party. *See Chu v. United States,* 773 F.2d 1226, 1229 (Fed.Cir.1985) ("[T]here is a 'well-established principle that, absent specific legislation, federal employees derive the benefits and emoluments of their positions from appointment rather than from any contractual or quasi-contractual relationship with the government.'"); *accord Hamlet v. United States,* 63 F.3d 1097, 1101 (Fed.Cir.1995).

Appellants initiated suit in the United States Court of Federal Claims to enforce the CBA as third party beneficiaries. The CBA, however, includes its own enforcement provisions. Specifically, the CBA requires grievance procedures for all disputes under that contract. Appellants have not invoked those grievance procedures. Thus, appellants, in essence, seek to gain the benefit of the CBA, and at the same time, to circumvent the exclusive grievance procedures of the contract. Ironically, the exclusive grievance procedures of the CBA preclude any party from challenging the CBA in the Court of Federal Claims, thereby providing an additional reason that the Court of Federal Claims lacks jurisdiction. *See, e.g., Chin v. United States,* 890 F.2d 1143, 1144-47 (Fed.Cir.1989); *Harris v. United States,* 841 F.2d 1097, 1098-1100 (Fed.Cir.1988); *Rinner v. United States,* 50 Fed. Cl. 333, 335-36 (2001); *Hayes v. United States,* 20 Cl.Ct. 150, 151, 156 (1990) (interpreting *Chin* and *Harris*).

Even assuming that a third party beneficiary could enforce the CBA and MOU in the Court of Federal Claims, appellants cannot establish jurisdiction under the Tucker Act for a claim for money

damages against the United States. Appellants essentially seek to use the CBA or the MOU as leverage to obtain a reclassification of the Albuquerque Center to an ATC-11 facility. Absent a prior reclassification, however, appellants have no claim for back pay. In other words, appellants cannot show any entitlement to an increased salary until the Albuquerque Center qualifies as an ATC-11 facility. Even if the Albuquerque Center would becomes an ATC-11 facility, appellants would have no claim for back pay because they would not be eligible for an increase in salary for any period before the Center's status adjustment. Thus, appellants are not seeking presently due money damages, but instead seek the equitable remedy of a reclassification of the Albuquerque Center to an ATC-11 facility and a salary increase based on that reclassification.

In *Testan,* the United States Supreme Court expressly addressed the jurisdiction of the Court of Federal Claims to provide this type of equitable relief. 424 U.S. at 394, 96 S.Ct. 948. The similarly-situated plaintiffs in *Testan* sought both a retroactive promotion from a pay-grade of GS-13 to GS-14 and back pay based upon that promotion.* *Id.* The *Testan* court

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* Mr. Todd attempts to distinguish *Testan* by arguing that Mr. Todd seeks merely a reclassification of a facility and a pay raise, not a new position. However, the plaintiffs in *Testan* likewise merely sought a pay raise from GS-13 to GS-14 for the position they held at the time. *See United States v. Testan,* 424 U.S. 392, 393, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976).

held that "federal agencies continue to have discretion in determining most matters relating to the terms and conditions of federal employment," and Government employees may not receive pay for positions to which they have not been appointed. *Id.* at 406, 96 S.Ct. 948. Without first obtaining a retroactive promotion, the Court found, the plaintiffs in *Testan* lacked an entitlement to money damages against the United States; the case was dismissed for lack of jurisdiction. *Id.* at 407-08, 96 S.Ct. 948.

The holding in *Testan* governs this case. This court does not read the holding in *Testan* as limited to cases involving the Classification Act or the Back Pay Act, as suggested by appellants. *Testan* confirms the long-standing rule that "one is not entitled to the benefit of a position until he has been duly appointed to it." *Id.* at 402, 96 S.Ct. 948 (citing *United States v. McLean,* 95 U.S. 750, 752, 24 L.Ed. 579 (1877); *Ganse v. United States,* 180 Ct.Cl. 183, 376 F.2d 900, 902 (Cl.Ct.1967)). This court also declines appellants' invitation to draw a distinction between the classification of a position and the classification of a facility. Appellants seek a retroactive promotion or pay raise based on the reclassification of the Albuquerque Center to an ATC-11 facility. Without first obtaining the reclassification and retroactive promotion, however, appellants have no claim for money damages against the United States. Absent a claim for presently due money damages against the United States, the Court of Federal Claims does not have jurisdiction under the Tucker Act to entertain

appellants' claims. Accordingly, this court affirms the Court of Federal Claims' dismissal of appellants' claims.

COSTS

Each party shall bear its own costs.

AFFIRMED.

(2)

No. 08-1415

In the Supreme Court of the United States

JOSEPH J. FILEBARK, II, ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

The Federal Aviation Administration's Personnel Management System (PMS), along with the Civil Service Reform Act of 1978 (CSRA), establishes a comprehensive system that regulates virtually every aspect of federal employment and "prescribes in great detail the protections and remedies applicable * * * , including the availability of * * * judicial review." *United States* v. *Fausto*, 484 U.S. 439, 443 (1988) (describing the CSRA).

The question presented is whether the PMS and CSRA, in combination, preclude judicial review under generally applicable statutes of disputes concerning all employment-related matters, including those not defined as "prohibited personnel practices" or "adverse actions," unless such review is expressly authorized for federal employees by the PMS or by federal statute.

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In the Supreme Court of the United States

No. 08-1415

JOSEPH J. FILEBARK, II, ET AL., PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a), is reported at 555 F.3d 1009. The opinions of the district court (Pet. App. 14a-24a, 25a-43a) are reported at 542 F. Supp. 2d 1 and 468 F. Supp. 2d 3.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2009. The petition for a writ of certiorari was filed on May 14, 2009. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Civil Service Reform Act of 1978 (CSRA or Act), Pub. L. No. 95-454, § 3, 92 Stat. 1111, to replace a "patchwork system" of federal personnel law "with an integrated scheme of administrative

and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *United States* v. *Fausto*, 484 U.S. 439, 445 (1988). The personnel system created by the CSRA provides a "comprehensive" scheme of protections and remedies for federal employment disputes, *id.* at 448, and "prescribes in great detail the protections and remedies applicable * * * , including the availability of * * * judicial review." *Id.* at 443. Because of its comprehensive nature, courts have routinely held that "Congress meant to limit the remedies of federal employees bringing claims closely intertwined with their conditions of employment to those remedies provided in the [CSRA]." *Lehman* v. *Morrissey*, 779 F.2d 526, 527-528 (9th Cir. 1985). See *Fornaro* v. *James*, 416 F.3d 63, 67 (D.C. Cir. 2005) ("what you get under the CSRA is what you get"); *Graham* v. *Ashcroft*, 358 F.3d 931, 933-936 (D.C. Cir.), cert. denied, 543 U.S. 872 (2004).

Under legislation enacted in 1995 and 1996, and amended in 2000, Congress revised federal personnel law as it applies to employees of the Federal Aviation Administration (FAA). Department of Transportation and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-50, § 347, 109 Stat. 460 (repealed by Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, § 307(d), 114 Stat. 125); Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104-264, § 253, 110 Stat. 3237 (49 U.S.C. 40122); Pub. L. No. 106-181, §§ 307(a), 308, 114 Stat. 124, 126 (49 U.S.C. 40122(a) and (g)). In those enactments, Congress made certain provisions of the CSRA applicable to FAA employees, but exempted the agency from the remaining provisions. See 49 U.S.C. 40122(g)(2). In lieu of the

inapplicable provisions of the CSRA, Congress directed the FAA to create a "personnel management system for the Administration that addresses the unique demands on the agency's workforce." 49 U.S.C. 40122(g)(1). To discharge that responsibility, the agency created the FAA Personnel Management System. See FAA *MYFAA Employee Site* (last modified June 25, 2009) (PMS), <https://employees.faa.gov/org/staffoffices/ahr/policy_guidance/hr_policies/pms/>.

The applicable provisions of the CSRA and the PMS together comprise a personnel system that is as fully comprehensive as that created by the CSRA. Like the CSRA, the hybrid FAA personnel system is an "elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983).

2. The CSRA and the hybrid FAA system each essentially creates a three-tiered system providing graduated procedural protections based on the seriousness of the personnel action at issue. Greatly simplified, the systems provide as follows: (a) for "adverse actions"—*i.e.*, "major personnel actions specified in the statute"—the systems afford an explicit right of judicial review in the Federal Circuit "after extensive prior administrative proceedings," *Carducci* v. *Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983) (Scalia, J.);[1] (b) for specified

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[1] FAA employees also have the option of pursuing claims regarding specified actions through the agency's "Guaranteed Fair Treatment" process, including the FAA Appeals Procedure, which allows employees ultimately to seek review of agency action in the federal courts of appeals. 49 U.S.C. 40122(h); PMS ch. III, para. 5(m). Although the PMS does not use the term "adverse action," the list of personnel actions that may be pursued through the Guaranteed Fair Treatment process tracks the list of actions defined as "adverse actions" in the CSRA.

"prohibited personnel practices"—*i.e.*, "personnel actions infected by particularly heinous motivations or disregard of law"—the systems provide administrative mechanisms to be followed by judicial review in the Federal Circuit under specified circumstances, *ibid.*; and (c) for remaining minor personnel matters involving bargaining-unit employees, the systems provide a grievance procedure followed by binding arbitration and sharply limited judicial review in the courts of appeals, 5 U.S.C. 7121, 7122, and 7123; and for such matters involving non-bargaining unit employees, the systems generally limit review to a separate internal agency grievance mechanism, see, *e.g.*, PMS ch. III, para. 4.

Employee complaints that are subject to a grievance procedure established pursuant to a collective bargaining agreement (CBA) are governed by Chapter 71 of the CSRA, which continues to apply to FAA personnel, 49 U.S.C. 40122(g)(2)(C). Under Chapter 71: federal employees may join unions to engage in collective bargaining, 5 U.S.C. 7101, 7102; management is obligated to engage in collective bargaining, 5 U.S.C. 7111, 7114(a)(1), 7117; and every CBA is required to contain a procedure for "the settlement of grievances," 5 U.S.C. 7121(a)(1). However, a "collective bargaining agreement may exclude any matter from the application of the grievance procedures." 5 U.S.C. 7121(a)(2). If parties engage in a negotiated grievance process, but are unable to achieve a satisfactory settlement of the employee's grievance, Section 7121 provides that the matter "shall be subject to binding arbitration which may be invoked by either the [union] or the agency." 5 U.S.C.

Compare PMS ch. III, para. 5(a), with 5 U.S.C. 7512. None of those actions is implicated in this case.

7121(b)(1)(C)(iii). Either party may then challenge the arbitrator's decision by filing exceptions with the Federal Labor Relations Authority (FLRA), 5 U.S.C. 7122(a), which may, in turn, "take such action and make such recommendations concerning the [arbitral] award as it considers necessary, consistent with applicable laws, rules, or regulations." 5 U.S.C. 7122(a)(2). The FLRA's decision regarding a challenge to an arbitration award is not subject to judicial review, unless the matter decided by the arbitrator involves an unfair labor practice. 5 U.S.C. 7123(a)(1). The FLRA does not have authority to review an arbitral award if the subject of the grievance is an adverse employment action covered by 5 U.S.C. 4303 or 7512. See 5 U.S.C. 7122(a). In such instances, the employee may seek judicial review of the arbitrator's award under 5 U.S.C. 7703 to the same extent as if the matter had been decided by the Merit Systems Protection Board (MSPB).

The CSRA's broad definition of "grievance" (incorporated into the PMS by 49 U.S.C. 40122(g)(2)(C)) includes "any complaint * * * by any employee concerning any matter relating to the employment of any employee" and "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." See 5 U.S.C. 7103(a)(9)(A) and (C)(ii). That broad definition encompasses both "prohibited personnel practice[s]," 5 U.S.C. 2302(a); PMS intro, Section VIII, and "adverse employment actions" (actions taken because of unacceptable performance, suspensions, or reductions in grade, etc.), 5 U.S.C. 4303, 7512; PMS ch. III, Section 3. Thus, an FAA employee covered by a CBA may contest prohibited personnel practices and adverse actions through the grievance procedures established by that agreement.

The CSRA provides alternative administrative remedies—apart from the negotiated grievance procedure—for prohibited personnel practices involving discrimination on the basis of race, sex, religion, age, disability, and other protected grounds, and for certain adverse employment actions. See 5 U.S.C. 2302(b)(1), 4303, 7512. Before 1994, if a grievance was covered by both the negotiated grievance procedure and other administrative procedures, an employee was required to elect which of those procedures he wished to pursue. 5 U.S.C. 7121(d) and (e)(1) (1988). But if the grievance did not involve one of the specified prohibited personnel practices or adverse employment actions for which alternative remedies were preserved, and if the matter was not excluded from the grievance procedures under the CBA, Section 7121(a)(1) provided that the negotiated grievance "procedures shall be the exclusive procedures for resolving grievances which fall within its coverage." 5 U.S.C. 7121(a)(1) (1988).

In 1994, Congress added a new Subsection (g) to Section 7121, which expanded employees' available options by giving employees covered by a CBA a choice of alternative remedies for "prohibited personnel practice[s]" not previously covered by Subsection (d), which governs discriminatory personnel actions. Act of Oct. 29, 1994, Pub. L. No. 103-424, § 9(b), 108 Stat. 4365. Under the 1994 amendment adding Section 7121(g), employees may challenge a prohibited personnel practice under the negotiated grievance procedure, or they may elect to pursue available administrative remedies through appeal to the MSPB, or by seeking corrective action from the Office of Special Counsel. 5 U.S.C. 7121(g). Thus, under current law, when a grievance is covered both by a collective bargaining agreement's negotiated grievance

procedures and by other procedures under Section 7121(d), (e) or (g), an employee has a choice of administrative remedies. 5 U.S.C. 7121(d), (e)(1), (g)(2) and (3).

To accommodate the addition of Section 7121(g), Congress also made what it characterized as "Technical and Conforming Amendments" to Section 7121(a)(1), the provision that requires CBAs to have grievance procedures and generally renders those procedures exclusive. Pub. L. No. 104-264, § 9(c), 108 Stat. 4366. The amendment made two revisions to the second sentence of Section 7121(a)(1): it added Subsection (g) to its list of statutory exceptions to the provision making CBA grievance procedures exclusive, and it added the word "administrative" between "exclusive" and "procedures." As amended, Section 7121(a)(1) provides:

> Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

5 U.S.C. 7121(a)(1).

Non-bargaining unit FAA employees who raise employment-related complaints concerning neither adverse actions nor prohibited personnel practices must utilize the grievance procedures set forth in the PMS. See PMS ch. III, para. 4(a) (establishing grievance procedure for "all employees of FAA not covered by a collective bargaining grievance procedure"). Those procedures act as a catch-all, covering all employment-related complaints that are neither prohibited personnel prac-

tices nor major adverse actions. *Id.* para. 4(b) and (c).[2] Paragraph 4 of the PMS explicitly designates the FAA Grievance Procedure as "the sole and exclusive method by which" FAA employees who are not members of a bargaining unit "can seek relief from the FAA, Department of Transportation, and/or the United States Government for issues related to the matters covered by this paragraph," and declares that "[t]he final decision of [the] FAA Grievance Procedure is not subject to review in any other forum." *Id.* para. 4(a) and (f)(ii).

3. a. Petitioners are four FAA employees who are or were employed at the Albuquerque, New Mexico Air Traffic Control Center (Albuquerque Center). Petitioners Joseph Filebark and John Havens are Air Traffic Control Specialists; petitioners Jerry Todd and Richard Boatman are Air Traffic Control Supervisors. All four petitioners were paid according to agreements negotiated between the National Air Traffic Controllers Association (NATCA) and the FAA; Filebark and Havens were bargaining members represented by NATCA.[3] The negotiated agreements created a system in which employee compensation was determined by the volume of traffic and complexity of operations at each facility. Petitioners claim that the classification system utilized incorrect air traffic figures for the Albuquerque Center,

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[2] Subparagraph 4(c)(xviii) exempts, *interalia*, "matters that are subject to appeal under FAA Appeals Procedure" (*i.e.*, "major adverse personnel action[s]"), 49 U.S.C. 41022(j); PMS ch. III, para. 5(a), as well as "matters covered by any other statutory appeals process" (*i.e.*, prohibited personnel practices), see 49 U.S.C. 40122(g)(2)(H); 5 U.S.C. 1204, 1211-1218, 1221, 7701-7703; PMS Intro., para. VIII.

[3] The two supervisory petitioners were not members of the NATCA, but were paid according to these negotiated agreements as a matter of policy adopted by the FAA Administrator.

which resulted in petitioners' salary levels' being too low. Pet. App. 2a-3a, 16a-18a.

In April 2000, petitioner Filebark filed a salary-level classification grievance with the Albuquerque Center, in accordance with the procedures established by the bargaining agreement. His grievance was denied, and NATCA subsequently refused his request to pursue the matter through arbitration. Representatives of the Albuquerque Center later applied on behalf of the Center for the salary-level upgrade, but that request was denied pending completion of a validation process for the computer system that performed the air traffic calculations. NATCA eventually filed a grievance on behalf of the Albuquerque Center employees, but later withdrew the grievance before it was resolved. Pet. App. 3a, 16a-17a.

Petitioner Todd, a non-bargaining unit controller, also attempted to file a grievance, but was unsuccessful. In July 2001, Todd filed suit in the Court of Federal Claims, which dismissed his suit in a decision affirmed by the Federal Circuit. See Pet. App. 20a-21a, 44a-63a.

b. Petitioners filed this action in federal district court, seeking review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, of the FAA's pay classification determinations for air traffic controllers at the Albuquerque Center. Petitioner Filebark also sought review of his grievance, citing 5 U.S.C. 7121(a)(1) as the source of that review. Pet. App. 2a-4a. None of the petitioners asserted a constitutional claim. The district court first dismissed the claims of the bargaining unit petitioners for lack of jurisdiction, determining that the grievance procedures negotiated in the CBA provided the exclusive remedy for resolution of their claims. *Id.* at 14a-24a. In a subsequent order, the court also

dismissed the claims of the non-bargaining unit petitioners on jurisdictional grounds, finding that the FAA's personnel management system precludes judicial review of FAA facility classification determinations. *Id.* at 25a-43a.

c. Petitioners appealed, and the court of appeals affirmed, holding that the CSRA precludes judicial review of petitioners' claims. The court held that Section 7121(a)(1) does not establish a federal employee's right to seek a judicial remedy for a grievance subject to a collective bargaining agreement. The Court also held that petitioners could not pursue their claims under the APA, 5 U.S.C. 702, because the CSRA precludes federal employees from seeking redress for employment-related claims through a judicial remedy unless such remedy is specifically permitted in the CSRA. Pet. App. 6a-7a, 9a-12a.

The court of appeals noted that the question before it was the one left unanswered by this Court in *Whitman* v. *Department of Transportation*, 547 U.S. 512, 514 (2006): "whether § 7121 (*or the CSRA as a whole*) removes the jurisdiction given to the federal courts or otherwise precludes employees from pursuing a claim under the APA." Pet. App. 7a (quoting *Whitman*, 547 U.S. at 514 (emphasis added; citation omitted)). Considering the 1994 amendment to Section 7121(a)(1), the court noted that the Federal Circuit in *Mudge* v. *United States*, 308 F.3d 1220, 1227 (2002), had treated the amended provision as permitting judicial review of grievances. But the court concluded that *Mudge* was incorrect and that "it is emphatically untrue that '§ 7121(a)(1) *establishes* [a] federal employee's right to seek judicial remedy for [a] grievance subject to negoti-

ated procedures in [a] collective bargaining agreement.'" Pet. App. 5a-7a (citation omitted; brackets in original).

The court next examined whether petitioners could seek redress of their employment-related complaints under the APA. Citing its own precedent in *Carducci* v. *Regan*, 714 F.2d 171, 172 (D.C. Cir 1983), and this Court's holding in *United States* v. *Fausto*, *supra*, the court concluded that the comprehensiveness of the CSRA precludes federal employees from pursuing remedies through the APA. Pet. App. 9a-12a. In keeping with existing D.C. Circuit precedent, the court reaffirmed that "what you get under the CSRA is what you get." *Ibid.* (relying on *Graham* v. *Ashcroft*, *supra*, and *Fornaro* v. *James*, *supra*).

The court of appeals acknowledged that Congress exempted the FAA from most of the CSRA's provisions, but found that exemption to be further evidence of Congress's intent to preclude judicial remedies for FAA employees unless such remedies are specifically authorized by the FAA's hybrid scheme. Pet. App. 10a-11a. The court concluded:

> Far from saving an APA claim, Congress's exemption [of the FAA] from the CSRA signals the same thing as Congress's omission of the type of personnel action at issue in *Graham* or the type of employees at issue in *Fausto*—namely that Congress intended to provide these employees with no judicial review. This is because we treat the CSRA and Congress's related employment statutes as covering the field of federal employee claims, and so our cases teach that those left out of this scheme are left out on purpose.

Ibid. The court further noted that, because Congress exempted the FAA from the CSRA in order to provide

for "greater flexibility" in employment decisions, inferring "a unique right of access to the courts" for FAA employees "would frustrate rather than further that intent." *Id.* at 11a.

Finally, the court rejected petitioners' argument that it was "inconceivable" that Congress would allow the FAA to devise a payment plan and then violate it with impunity. Pet. App. 11a. The court noted that the petitioners who are covered by the CBA do have a remedy: if the FAA fails to live up to its agreements, the union can pursue the matter and, if the union fails to live up to its duty of fair representation, the petitioners "can pursue the union." *Id.* at 12a-13a. The court therefore affirmed the district court's conclusion that petitioners' APA claims "are precluded by the CSRA as a whole regardless of who brings them." *Id.* at 13a-14a.[4]

ARGUMENT

The court of appeals correctly held that the CSRA, in conjunction with the PMS, precludes judicial review of all employment-related claims—including claims that do not qualify as "prohibited personnel practices" or as "adverse actions" under either scheme—unless such review is specifically permitted by the CSRA or the PMS. The United States agrees with petitioner, however, that this case presents a recurring question of substantial importance on which there is a direct conflict among the courts of appeals. Review by this Court would therefore be appropriate.

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[4] In a ruling not challenged, the court of appeals rejected petitioners' contention that the district court violated the law of the case doctrine in reversing, without a change in law or facts, its previous denial of a motion to dismiss the APA claims. Pet. App. 8a-9a.

1. Petitioners' argument that the CSRA does not preclude judicial review of the claims at issue has two components. The first is that the APA provides a cause of action for all federal employees, whether or not covered by a negotiated grievance procedure, for matters that the CSRA does not define as either a prohibited personnel practice or an adverse action.[5] The second is that Section 7121(a) specifically authorizes judicial review of all matters subject to the grievance procedure in a CBA and that the APA provides the cause of action for

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[5] The court of appeals' determination that the CSRA precludes judicial review of all employment-related claims, including claims that are neither "prohibited personnel practices" nor "adverse actions" unless such review is specifically provided for federal employees in the CSRA or elsewhere, is consistent with decisions from the Second, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits. *E.g.*, *Tiltti* v. *Weise*, 155 F.3d 596, 600-601 (2d Cir. 1998); *Pinar* v. *Dole*, 747 F.2d 899, 912-913 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); *Broadway* v. *Block*, 694 F.2d 979, 981-986 (5th Cir. 1982); *Ryon* v. *O'Neill*, 894 F.2d 199, 201-204 (6th Cir. 1990); *Veit* v. *Heckler*, 746 F.2d 508, 511 (9th Cir. 1984); *Weatherford* v. *Dole*, 763 F.2d 392, 393-394 (10th Cir. 1985). The decision conflicts, however, with the narrower rule applied in the Federal and First Circuits, which have held that the CSRA does not bar judicial review of an employment-related decision that is not governed by the CSRA provisions covering prohibited personnel practices and adverse actions. *E.g.*, *Worthington* v. *United States*, 168 F.3d 24, 26-27 (Fed. Cir. 1999); *Romero* v. *United States*, 38 F.3d 1204, 1211 (Fed. Cir. 1994); *Dugan* v. *Ramsay*, 727 F.2d 192, 194-195 (1st Cir. 1984); but see *Irizarry* v. *United States*, 427 F.3d 76, 78 n.2 (1st Cir. 2006) (noting, but not deciding, that *Dugan* may be inconsistent with this Court's later decision in *Fausto*).

that review.[6] The court of appeals correctly rejected both contentions. Pet. App. 6a-13a.

a. Petitioners are correct (Pet. 11-12) that the courts of appeals disagree about whether the CSRA precludes judicial review of employment-related actions that are not covered by Chapter 75 of the CSRA (Adverse Actions). But petitioners misunderstand the scope of the CSRA when they describe actions that are outside the purview of Chapter 75 as "no[t] otherwise covered by the Act." See Pet. i, 12. The CSRA covers every employment-related action taken in the federal employment context. When Congress enacted the CSRA, it "comprehensively overhauled the civil service system," *Lindahl* v. *OPM*, 470 U.S. 768, 773 (1985), "prescrib[ing] in great detail the protections and remedies" available to federal employees, "including the availability of administrative and judicial review," *Fausto*, 484 U.S. at 443.

This Court has had a number of occasions to consider whether federal employees may seek judicial review of work-related disputes when such review is not specifically provided by the CSRA. In each case, the Court has held that federal employees are limited to the remedies explicitly provided or referenced by the CSRA itself. Thus, in *Bush* v. *Lucas*, 462 U.S. 367 (1983), the Court refused to recognize an implied cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bu-*

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[6] The court of appeals in this case agreed with the Ninth Circuit on this question, see *Whitman* v. *Department of Transportation*, 382 F.3d 938 (2004), rev'd on other grounds, 547 U.S. 512, 513 (2006); but those courts are in conflict with the Federal Circuit, see *Mudge* v. *United States*, 308 F.3d 1220, 1228-1230 (2002), and the Eleventh Circuit, see *Asociacion De Empleados Del Area Canalera* v. *Panama Canal Comm'n*, 329 F.3d 1235, 1241 (2003).

reau of Narcotics, 403 U.S. 388 (1971), to enable a federal employee to sue an agency official for damages for alleged constitutional violations in employment. Although the Court had recognized a damages cause of action against federal officials for constitutional violations in other contexts, the Court held that it would be "inappropriate" to supplement the "comprehensive procedural and substantive provisions" regulating federal employment with a new judicial remedy. *Bush*, 462 U.S. at 368. See *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988).

Similarly, in *Fausto*, the Court held that the CSRA's "integrated scheme of administrative and judicial review" precluded federal employees from obtaining judicial review in a suit for back pay under the Tucker Act, 28 U.S.C. 1491, given that the CSRA did not explicitly provide for that remedy. *Fausto*, 484 U.S. at 445. Considering both the language and the structure of the CSRA, the Court held "that the absence of provision for these employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather a manifestation of a considered congressional judgment that they should not have statutory entitlement to review." *Id.* at 448-449. And in *Karahalios* v. *National Federation of Federal Employees, Local 1263*, 489 U.S. 527 (1989), the Court held that judicial enforcement of the duty of fair representation is barred because the CSRA empowers the FLRA to enforce a union's statutory duty of fair representation and because "[t]here is no express suggestion in [the CSRA] that Congress intended to furnish a parallel remedy in a federal district court to enforce" the duty. *Id.* at 532.

A straightforward application of *Fausto* compels the conclusion that the CSRA precludes petitioners from pursuing their grievances (which concern neither pro-

hibited personnel practices nor adverse actions) by suing directly in district court under the APA. Indeed, the basis for preclusion is even stronger in these circumstances than it was in *Fausto* because the APA (unlike the Back Pay Act, 5 U.S.C. 5596 *et seq.*, and Tucker Act, 28 U.S.C. 1346 *et seq.*) explicitly states that its provisions are inapplicable if another statute "preclude[s] judicial review." 5 U.S.C. 701(a)(1); see 5 U.S.C. 702; *Webster* v. *Doe*, 486 U.S. 592, 599 (1988). Congress expressly provided in the CSRA for a right of judicial review of grievances in only two specific circumstances: when the matter involves an adverse action covered by 5 U.S.C. 4303 or 7512, see 5 U.S.C. 7121(f), and when the matter involves a claim of an unfair labor practice and the arbitral award has been reviewed by the FLRA, see 5 U.S.C. 7123(a). Moreover, when Congress wished to preserve existing remedial schemes outside the CSRA, it said so directly: the CSRA expressly preserves employees' right to bring suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and other laws prohibiting discrimination. 5 U.S.C. 2302(d); see PMS intro. para. VIII(b)(ii). The "highly selective manner in which Congress has provided for judicial review" (*Switchmen's Union of N. Am.* v. *National Mediation Board*, 320 U.S. 297, 305 (1943)), within the context of the comprehensive and "integrated scheme of administrative and judicial review" that the CSRA created, is a "manifestation of a considered congressional judgment" that employees do not have a general right to judicial review of workplace complaints. *Fausto*, 484 U.S. at 445, 448; accord *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 347 (1984); *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).

It is true that the FAA is for the most part exempt from the CSRA, except for Chapter 71 (see p. 4, *supra*);[7] but Congress created the exemption in recognition of the "significant problems" that confront "the national air transportation system," and as a way to provide the FAA with increased flexibility so as to help it fulfill its "unique" mission of "operat[ing] 24 hours a day, 365 days of the year * * * [in] a state-of-the-art industry," Pub. L. No. 104-264, §§ 221(1) and (14), 110 Stat. 3227. Congress directed the agency to establish a "personnel management system * * * that addresses the unique demands on the agency's workforce" to operate in lieu of the CSRA provisions Congress made inapplicable to the FAA. 49 U.S.C. 40122(g)(1). The resulting PMS closely parallels the CSRA and, together with the applicable provisions of the CSRA, is as fully comprehensive as the system created by the CSRA itself.

The PMS and CSRA do not provide for judicial review of petitioners' grievances. Petitioners complain about the pay classification of the facility at which they are or were employed. The FAA's hybrid personnel system does not provide for judicial review of agency decisions regarding the pay classifications of facilities that employ FAA personnel. See C.A. App. 110-111. Nor does it provide for judicial review of matters subject to the FAA Grievance Procedure, which covers all employment-related concerns of non-bargaining-unit employees other than prohibited personnel practices and adverse actions. PMS ch. III, para. 4. The court of appeals, therefore, correctly held that judicial review of the employment-related claims at issue in this case is

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[7] With one exception not relevant here, Chapter 71 of the CSRA applies to the FAA workforce and governs FAA employees' grievances subject to grievance procedures negotiated under CBAs.

barred because it is not specifically authorized under the CSRA or the PMS. See, *e.g.*, Pet. App. 10a (citing *Fornaro* v. *James*, 416 F.3d 63, 67 (D.C. Cir. 2005) ("what you get under the CSRA is what you get")).[8] As the court pointed out, Congress's decision generally to exempt the FAA from the CSRA "signals the same thing as Congress's omission of the type of personnel action at issue in *Graham* or the type of employees at issue in *Fausto*—namely that Congress intended to provide these employees with no judicial review." *Ibid.*[9]

b. The court of appeals also correctly rejected the bargaining unit petitioners' contention that, regardless of the general preclusive effect of the CSRA and PMS, they are entitled to judicial review because the 1994 technical amendment to 5 U.S.C. 7121(a)(1) affirmatively authorizes such review for work-related grievances covered by a CBA. See Pet. App. 6a-7a (rejecting petitioners' argument that "§ 7121(a)(1) *establishes* [a] federal employee's right to seek judicial remedy for [a] grievance subject to negotiated procedures in [a] collective bargaining agreement"). Contrary to the holdings of the Federal and Eleventh Circuits in *Mudge* v. *Uni-*

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[8] This issue is also presented in the petition for a writ of certiorari in *Grosdidier* v. *Chairman, Broadcasting Board of Governors*, No. 08-1418 (May 14, 2009). The *Grosdidier* petition raises the preclusion issue just addressed but not the issue concerning the 1994 amendment to Section 7121(a) that is discussed below. As a result, the United States is filing a response in the *Grosdidier* case recommending that the Court either hold the petition there and dispose of it in light of its resolution in this case or deny the petition.

[9] This Court's holding in *Darby* v. *Cisneros*, 509 U.S. 137, 145-154 (1993), that a reviewing court in an APA case lacks discretion to require exhaustion of administrative remedies, does not apply to this case because Congress intended to preclude judicial review of petitioners' claims entirely, including review under the APA.

ted States, 308 F.3d 1220 (Fed. Cir. 2002), and *Asociacion De Empleados Del Area Canalera* v. *Panama Canal Comm'n*, 329 F.3d 1235 (11th Cir. 2003) (see p. 14 note 6, *supra*), the 1994 technical amendment to Section 7121(a)(1) did not *sub silentio* reverse well-settled law to create a new right to judicial review of federal employee grievances.[10]

By inserting the word "administrative" in Section 7121(a)(1), Congress did not *explicitly* create a right of judicial review. Nor is there any indication that Congress intended to *implicitly* create such a right. This Court had made clear prior to 1994 that only an express statutory provision would create a right of judicial review, given that "the CSRA's integrated scheme of administrative and judicial review foreclose[s] an implied right to [district court] review." *Karahalios*, 489 U.S. at

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[10] Prior to the 1994 amendment to Section 7121(a)(1), the en banc Federal Circuit held in *Carter* v. *Gibbs*, 909 F.2d 1452 (1988), cert. denied, 498 U.S. 811 (1990), that federal employees covered by a CBA could not bring suit in district court for overtime pay under the FLSA, and that "the procedures [set out in the Collective Bargaining Agreement] * * * [were] the exclusive procedures for resolving grievances which fall within its coverage." *Id.* at 1454 (brackets in original) (quoting 5 U.S.C. 7121(a)(1) (1988)). The court declined to recognize a right to judicial review because "Congress narrowly circumscribed the role of the judiciary in its carefully crafted * * * scheme" by providing for judicial review only in certain instances. *Id.* at 1456. At the time of the 1994 amendment, other federal courts had adopted the *Carter* decision, uniformly holding that the CSRA precludes employees subject to a CBA's grievance procedures from bypassing those procedures and seeking judicial review. See, *e.g.*, *O'Connell* v. *Hove*, 22 F.3d 463, 468-471 (2d Cir. 1994); *Johnson* v. *Peterson*, 996 F.2d 397, 398 (D.C. Cir. 1993); *Saul* v. *United States*, 928 F.2d 829, 842 n.23 (9th Cir. 1991); see *Abbott* v. *United States*, 144 F.3d 2, 6 n.4 (1st Cir. 1998) (discussing *Carter*); *Parker* v. *King*, 935 F.2d 1174, 1176-1178 (11th Cir. 1991) (same), cert. denied, 505 U.S. 1229 (1992).

536 (quoting *Fausto*, 484 U.S. at 445). And the legislative history of the bill that contained the 1994 amendment confirms that Congress was aware that it would be "necess[ary] [to] explicitly stat[e] when Congress intends to give employees a choice of remedies." *To Reauthorize the Office of Special Counsel and to Make Amendments to the Whistleblower Protection Act: Hearing on H.R. 2970 Before the Subcomm. on the Civil Service of the House Comm. on Post Office and Civil Service*, 103d Cong., 1st Sess. 22 (1993) (statement of Robert M. Tobias, President, NTEU) (emphasis added). Thus, Congress would not have thought in 1994 that simply inserting the word "administrative" in Section 7121(a)(1) would create a new right to judicial review of matters subject to CBA grievance procedures. See *Karahalios*, 489 U.S. at 536 (noting that, because "Congress undoubtedly was aware" of the standard for recognizing implied private rights of action, "we would expect to find some evidence of that intent in the statute or its legislative history").

On the contrary, the scheme established in the CSRA evinces congressional intent to preclude judicial review except in the narrow circumstances set out in the statute itself. As discussed at pp. 4-6, *supra*, when an employee's position is covered by a CBA, the CSRA channels employee grievances through negotiated grievance procedures unless the subject matter of the grievance falls within an express statutory exception or has been specifically exclude l from coverage by the CBA itself. If the negotiated procedures do not resolve the grievance, either the union or the agency may invoke binding arbitration, 5 U.S.C. 7121(b)(1)(C)(iii), with subsequent review of the arbitrator's decision by the FLRA, 5 U.S.C. 7122(a). That structure reflects "the Congres-

sionally unambiguous and unmistakable preference for exclusivity of arbitration[, which] is a central part of the comprehensive overhaul of the civil service system provided by the CSRA." *Muniz* v. *United States*, 972 F.2d 1304, 1309 (Fed. Cir. 1992). "To hold that the district courts must entertain such cases in the first instance would seriously undermine what [the Court] deem[s] to be the congressional scheme." *Karahalios*, 489 U.S. at 536-537; accord *Fausto*, 484 U.S. at 449 (holding that judicial review outside the framework of the CSRA would be incompatible with various "structural elements" of the CSRA, such as "the primacy of the MSPB for administrative resolution of disputes over adverse personnel action, and the primacy of the United States Court of Appeals for the Federal Circuit for judicial review").

Moreover, the structure of the CSRA shows that Congress knew how to explicitly grant judicial review of matters subject to negotiated grievance procedures when it desired that result. Congress expressly provided that, if a matter involves an adverse employment action covered by 5 U.S.C. 4303 or 7512, the employee may seek judicial review of the arbitrator's award under 5 U.S.C. 7703 in the same manner and under the same conditions as if it had been rendered by the MSPB. Congress's provision of an express right to judicial review for those matters is evidence that Congress intended to preclude such review for all others. See *Fausto*, 484 U.S. at 447-450; *Erika*, 456 U.S. at 208.

Indeed, reading Section 7121(a)(1) to authorize judicial review implicitly, as the Federal and Eleventh Circuits did, would produce an anomalous result. As required by the regulations implementing the CSRA, federal agencies have established their own grievance pro-

cedures for employees who are not covered by CBAs and therefore are not subject to the grievance procedures contained in such agreements. See 5 C.F.R. 771.201 (1995) (requiring such grievance procedures).[11] Under the Federal and Eleventh Circuits' interpretation of the amended Section 7121, federal employees subject to a CBA may now avoid the grievance procedures established by the CBA and present their grievances directly to the courts without resort to any administrative procedures at all. But, because Section 7121 applies only to grievance procedures established by CBAs, federal employees who are not subject to CBAs would remain limited to using their agencies' internal grievance procedures and would be precluded from judicial review. Such preferential treatment of employees subject to CBAs makes no sense. There is no reason to believe that Congress intended to grant federal employees who have the benefit of union representation a right to bypass grievance procedures that are the product of collective bargaining and go directly to court—even for minor disputes—while continuing to subject other federal employees to grievance procedures that they had no say in adopting.

The Federal and Eleventh Circuits' construction of Section 7121(a)(1) also defies this Court's admonition that courts should be cautious about interpreting technical and conforming amendments to make substantive changes to the law when "there is no indication that

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[11] The Office of Personnel Management later rescinded the regulations governing agency administrative grievance procedures to permit agencies greater flexibility in the establishment of grievance systems. 60 Fed. Reg. 47,039 (1995). But each agency was required to maintain its previously established grievance systems until the system was either modified or replaced. 5 CFR 771.101.

Congress intended to change" the law. *Director of Revenue* v. *CoBank ACB*, 531 U.S. 316, 323 (2001). Conforming amendments are typically added for the sake of clarity and are not intended to change legal standards. See *e.g.*, *INS* v. *Stevic*, 467 U.S. 407, 428 (1984). The Federal Circuit's reading "would mean that Congress made a radical—but entirely implicit—change" in the 1994 amendment. *CoBank*, 531 U.S. at 324. "[I]t would be surprising, indeed, if Congress" had done that "*sub silentio*." *Id.* at 323. See *Mudge* v. *United States*, 50 Fed. Cl. 500, 506 (2001) ("We find it inconceivable that Congress intended to alter this basic structural reform of the Civil Service Reform Act by a one-word change that was introduced as a technical amendment without discussion, explanation, or debate."), rev'd, 308 F.3d 1220 (Fed. Cir. 2002).

The insertion of the word "administrative" in Section 7121(a)(1) was intended to clarify what remedies are available to federal employees pursuing grievances. As explained at pp. 6-8, *supra*, the 1994 Amendments added a new Subsection (g) to Section 7121, which gave federal employees a choice of administrative remedies—either the negotiated grievance procedure or a different administrative procedure specified by statute—for grievances concerning prohibited personnel practices other than discriminatory personnel actions. Similarly, under Subsections (d) and (e), federal employees have a choice between these administrative remedies for addressing grievances relating to discriminatory personnel practices and adverse actions, respectively. Employees asserting grievances about matters covered under Subsections (d), (e), and (g), are also entitled to judicial review of administrative determinations regarding their grievances in some circumstances. See pp. 3-4, *supra*. The

conforming amendment clarified that the negotiated grievance procedure would be the exclusive "administrative" remedy "except" in the circumstances identified by those three Subsections. By adding the word "administrative," Congress more accurately described the available alternative administrative remedies available to federal employees—the negotiated grievance procedures in some circumstances, a choice between those procedures and specified statutory procedures in other circumstances—without creating any implications for the wholly separate question of judicial review.

In addition, the amendment conformed Subsection (a) with Subsection (f), which addresses the availability of judicial review of arbitration awards involving adverse actions under the CSRA and "similar" matters under other personnel systems. Because Subsection (a) does not expressly reference Subsection (f), prior to the conforming amendment Subsection (a)'s statement that the CBA's grievance procedure constituted the "exclusive procedure[] for resolving grievances which fall within its coverage" might have appeared to conflict with Subsection (f)'s provision of judicial review of arbitration awards stemming from grievance procedures involving adverse actions. By clarifying that the CBA grievance procedures are the "exclusive administrative procedures," the conforming amendment helps avoid the misconception that Congress intended in Subsection (a) to limit judicial review otherwise available under Subsection (f) of the CSRA.

2. This case implicates recurring issues of considerable practical importance both to the Nation's largest employer and to its employees. The Federal and First Circuits' decisions permitting judicial review of federal employees' complaints that concern neither adverse ac-

tions nor prohibited personnel practices undermines the intricate system Congress created in the CSRA and PMS. Such flouting of the "considered congressional judgment" that federal employees are not entitled to judicial review of some types of employment-related complaints, *Fausto*, 848 U.S. at 448-449, also creates an untenable lack of uniformity in federal employment law.

That problem is compounded by the direct conflict among the courts of appeals over the meaning of the 1994 amendment to Section 7121(a)(1). The rule adopted by the Federal and Eleventh Circuits could require the federal government to litigate employee grievances in federal court in the first instance, involving considerable delay and additional expense compared to the traditional—and congressionally preferred—remedy of addressing such claims through the negotiated grievance process, followed by the availability of binding arbitration. Because employment grievances of the sort governed by Section 7121(a)(1) are common, the rule adopted by the Federal and Eleventh Circuits would create a significant litigation burden on the government. That approach also undermines the role of the collective bargaining representative in resolving grievances and interferes with the government's ability to resolve complaints expeditiously through the grievance process or binding arbitration.

Accordingly, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Nos. 08-1415 and 08-1418

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In The Supreme Court of the United States

JOSEPH J. FILEBARK, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION and FEDERAL AVIATION ADMINISTRATION,

Respondents.

CAMILLE GROSDIDIER, *et al.*,

Petitioners,

v.

CHAIRMAN, BROADCASTING BOARD OF GOVERNORS,

Respondent.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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The petitions in No. 08-1415, *Filebark v. Department of Transportation*, and No. 08-1418, *Grosdidier v. Chairman, Broadcasting Board of Governors*, pose the same question presented. For the reasons set out below, the Court should grant certiorari in both cases and consolidate them for briefing and argument.

I. THESE CASES PRESENT AN IMPORTANT AND WELL-ESTABLISHED INTER-CIRCUIT CONFLICT

The United States correctly describes the decisions of the court of appeals in both *Filebark* and *Grosdidier* as holding that the "CSRA precludes judicial review of all employment-related actions (unless judicial review is specifically permitted in the CSRA itself)." (Grosdidier R. Br. at 7; see Filebark R. Br. at 12). That holding, the government observes, is in conflict with decisions in the Federal and First Circuits. (Grosdidier R. Br. at 7 and n.8; Filebark R. Br. at 12, 13 n.5). The government's recognition of the existence of this inter-circuit conflict reflects not only a sound reading of the decisions involved, but also the extensive practical experience of the Department of Justice in litigating scores of federal employee claims under the divergent standards applied by the various courts of appeals.

The Federal Circuit holds that the CSRA precludes judicial review only of claims that concern a type of employment practice specifically addressed by the CSRA itself, such as disciplinary action. The

Federal Circuit's limited preclusion rule would not apply to the claim in *Filebark* (which concerns the proper classification of an entire facility) or *Grosdidier* (which concerns a statute that entitles suitably qualified citizens to be promoted ahead of more qualified aliens). The NTEU[1] disputes the government's characterization of the breadth of the D.C. Circuit preclusion standard, but does not assert that the Federal Circuit would hold that claims in *Filebark* and *Grosdidier* are barred by the CSRA.

The NTEU suggests that the D.C. Circuit holds only that the CSRA bars judicial review of non-CSRA employment-related claims where "Congress' intent to proscribe review is 'fairly discernable' in the CSRA's scheme." (NTEU Br. at 9). But that circuit's caselaw gives a sweeping preclusive effect to the CSRA because the D.C. Circuit insists that an intent to proscribe review is discernable with regard to *all* federal employment-related claims.[2] Similarly, the

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[1] For simplicity we refer to the union amici in this case as the NTEU, and cite the Brief for the National Treasury Employees Union and American Federation of Government Employees, AFL-CIO, as "NTEU Br."

[2] *Fornaro v. James*, 416 F.3d 63, 67 (D.C. Cir. 2005):

> We ... concluded in *Carducci v. Regan*, 714 F.2d 171, 174-75 (D.C. Cir. 1983), that no remedy was available under the APA for an employment claim as to which the CSRA provided no relief. As we explained, that "failure to include" any relief "within the remedial scheme of so comprehensive a piece of legislation reflects a congressional intent that no judicial relief be available."

(*quoting Carducci v. Regan*, 714 F.2d 171, 174 (D.C. Cir. 1983)).

union urges that all circuits agree on "the unremarkable proposition that the CSRA precludes review of claims that fall within its scope." (NTEU Br. at 15-16). But the courts of appeals disagree about what claims do fall within the scope of the CSRA. The D.C. Circuit insists that all employment-related claims (or at least all claims involving agency personnel actions) fall within the scope of the CSRA; the Federal Circuit, on the other hand, holds that only claims regarding the particular practices expressly addressed in the CSRA fall within the scope of the CSRA.

The NTEU asserts that

> the court below [in *Filebark*] explicitly recognized in its decision that federal employees could pursue claims in court that are grounded on a "source of law" that is "independent" of the CSRA.

(NTEU Br. at 8, *quoting* Filebark Pet. App. 7a). The court of appeals did not so hold. The court of appeals stated that the existence of a "source of law" "independent" of the CSRA is necessary, but not that it is sufficient. The APA *is* just such a source of law, independent of the CSRA, authorizing judicial review of government actions. The court of appeals nonetheless rejected the plaintiffs' claims, holding that employment-related claims under the APA (claims which presumably would have been viable prior to the adoption of the CSRA) are precluded by the CSRA.

> [T]he employees ... must point to an independent source of law in order to maintain this action.... [T]he only basis for a cause of action... is the APA.... [T]he case ... begins and ends with the question ... "whether ... *the CSRA as a whole* ... removes the jurisdiction given to the federal courts or otherwise precludes employees from pursuing" a claim under the APA....

(Filebark Pet. App. 7a) (emphasis in original).

The NTEU suggests that the District of Columbia Circuit construes the CSRA to preclude, not all claims in any way related to federal employment, but only claims about agency personnel actions. (NTEU Br. at 9, 11, 15). Even if that were the case, the D.C. Circuit standard would still conflict with the decisions in the Federal Circuit. The Federal Circuit has repeatedly rejected arguments by the United States that the CSRA precludes review under any other statute of claims regarding agency personnel actions. *Worthington v. United States*, 168 F.3d 24, 26-27 (Fed. Cir. 1999); *Romero v. United States*, 38 F.3d 1204, 1211 (Fed. Cir. 1994).

The D.C. Circuit preclusion standard, moreover, cannot be as limited as the NTEU suggests. The claim in *Filebark* itself – which the D.C. Circuit held precluded by the CSRA – did not involve an agency "personnel action," as that phrase would normally be understood. The agency in *Filebark* had not taken action directed at the employment status or benefits of a particular federal worker; rather, the disputed practice was the failure of the agency to alter the

classification of an air traffic control facility. The NTEU itself describes the broad preclusion standard in the Ninth, Tenth and Eleventh Circuits as barring not only claims regarding agency personnel actions, but more broadly "state tort claims *related to* employment." (NTEU Br. at 15 n.14; see *id.* at 15) (emphasis added). The union acknowledges that the D.C. Circuit itself characterizes its own standard as precluding "federal employee claims." (NTEU Br. at 11). The decisions below articulated the D.C. Circuit standard in just such all-inclusive terms. (Filebark Pet. App. 11a; Grosdidier Pet. App. 5a, 7a).

II. REVIEW SHOULD BE GRANTED IN BOTH *FILEBARK* AND *GROSDIDIER*

A. We agree with the United States that the court of appeals decision in *Filebark* is an appropriate vehicle for resolving the question presented.

The court of appeals decision in *Filebark* rests on that circuit's view of the general preclusive effect of the CSRA. The United States correctly describes the circuit court's opinion as holding that

> petitioners could not pursue their claims under the APA ... because the CSRA precludes federal employees from seeking redress for employment-related claims through a judicial remedy unless such

remedy is specifically permitted in the CSRA.[3]

The NTEU does not deny that the court of appeals decision was based on the D.C. Circuit's well-established CSRA preclusion standard.

The NTEU nonetheless argues that *Filebark* is not an appropriate vehicle for resolving the dispute about the preclusive effect of the CSRA, even though CSRA preclusion was the actual basis of the court of appeals decision, because the *district court* concluded that there was a separate basis for refusing to consider the claims of the plaintiffs in *Filebark*. (NTEU Br. at 6-8). The district court held that, regardless of whether the CSRA precluded consideration of the plaintiffs' claims, judicial review of those claims was barred by the terms of the Department of Transportation Act. (Filebark Pet. App. at 43a). The union does not contend that the court of appeals itself ever addressed that alternative basis for rejecting the complaint.

Filebark thus presents the common situation in which a court of appeals has ruled for the respondent on one ground, without addressing other alternative arguments advanced by that party. This Court routinely grants certiorari in such cases; if the petitioner prevails on the question presented, the case is then routinely remanded to the lower courts for further consideration of any remaining claims or defenses of

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[3] Filebark R. Br. at 10.

the respondent. The NTEU offers no reason why that well-established practice should not be followed in the instant case.

The NTEU asserts that "the relevant ... question presented by this case is whether petitioners' claims are precluded by the DOT Act." (NTEU Br. at 7). But that is precisely the alternative ground which the court of appeals did *not* address. A certiorari petition could not properly have presented a question about the preclusive effect of the DOT Act, because that issue was never decided by the court of appeals below. If this Court, addressing the CSRA issue that was decided by the court of appeals, holds that the CSRA does not by itself preclude petitioners' claims, the court of appeals on remand will be free to resolve, as it did not in its earlier opinion, whether the DOT Act may have such a preclusive effect.

The NTEU similarly errs when it asserts that "[t]here is ... no need for this Court to address the question of whether the CSRA precludes petitioners' claims." (*Id.* at 7). To the contrary, that is the only question which the Court needs to, or even should address, because that is the question which was decided by the court below. Resolution of that question regarding the preclusive scope of the CSRA would be unnecessary only if the court of appeals, in addition to rejecting petitioners' claims on the basis of CSRA preclusion, had also rejected those claims on the alternative ground – relied on by the district court – that those claims are barred by the DOT Act. But the NTEU does not suggest that the court of appeals ever decided the latter issue.

The judicial review provisions of the CSRA are expressly applicable to employees at the FAA. 49 U.S.C. § 40122(g)(3). The D.C. Circuit thus understandably concluded that it was appropriate "to apply our [CSRA] preclusion cases to employees of [the FAA]." (Filebark Pet. App. at 10a). There are, of course, differences between some internal practices (such as salary scales) at the FAA and at other agencies. But as this Court made clear in *United States v. Fausto*, 484 U.S. 439, 448-49 (1988), any argument that the CSRA precludes judicial review under some other statute necessarily turns on the scope of, and exclusions from, the judicial review provisions of the CSRA itself. Thus *Filebark* is an appropriate vehicle for determining the preclusive effect of the judicial review provisions of the CSRA, which apply to the FAA just as they do to other federal agencies.

B. The court of appeals decision in *Grosdidier* is also an appropriate vehicle for resolving the question presented.

The court of appeals held that the claims of the *Grosdidier* plaintiffs were barred by the broad preclusive effect of the CSRA. The district court had rejected those claims on a different basis. The district court instead accepted the government's contention that the plaintiffs were actually claiming that they had been denied promotions in favor of less qualified applicants, a practice that could violate Chapter 23 of the CSRA. That characterization of plaintiffs' claims, if correct, could bar review of those claims under the APA; violations of the CSRA are only subject to

judicial review under the CSRA itself. On appeal the plaintiffs challenged that holding.[4] Rather than address that issue, however, the court of appeals held that the *Grosdidier* claims – regardless of whether (as the plaintiffs contended) those claims fell outside the prohibitions of the CSRA – were precluded by the CSRA.

The government acknowledges that the court of appeals "did not rely on the district court's conclusion" that the plaintiffs' claims would constitute a violation of the CSRA. (Grosdidier R. Br. at 8). It nonetheless urges that the existence of this unresolved dispute regarding the correctness of the district court's reasoning makes this case an unsuitable vehicle for resolving the distinct question of law, regarding the CSRA, which was in fact the sole basis of the court of appeals decision.

The United States suggests that *Grosdidier* is not an appropriate vehicle to review the court of appeals decision regarding the preclusive effect of the CSRA because the "petitioner does not challenge ... before this Court" the district court's holding that the claims of the Grosdidier petitioners were barred because they asserted a violation of the CSRA. (Grosdidier R. Br. 9). But it would have been entirely premature and inappropriate for petitioners to challenge in this Court a holding of the district court which has never been passed on by the court of appeals. At this point

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[4] Appellants' Brief, Grosdidier v. Glassman, No. 08-5181 (D.C. Cir.) at 17-21.

in the litigation this Court would not consider a challenge to an as yet unreviewed holding of the district court. The government does not suggest that the Grosdidier petitioners in the court of appeals failed to challenge – and thus waived any objection to – that holding of the district court on this issue. To the contrary, in the court of appeals the Grosdidier petitioners emphatically sought reversal of that district court decision.

The government suggests that "a ruling by the Court in petitioners' favor on the broad issue they present [regarding the preclusive effect of the CSRA] *would not appear* to permit the judicial review they seek." (Grosdidier R. Br. at 9) (emphasis added). But the Solicitor General is not suggesting that the court of appeals has already addressed and resolved (in the government's favor) the alternative defense argument relied on by the district court. Nor is the Solicitor General indicating that the government will ask this Court to consider that record-bound contention – which the court of appeals itself never passed on – as an alternative basis for affirmance. Rather, this passage is simply a prediction that it "appear[s]" that on remand the government will ultimately prevail on this alternative ground. The United States offers no explanation as to why it "would ... appear" that the government will prevail on that issue on remand, and circumspectly neither defends nor even describes the rationale of the district court opinion.

There is substantial reason to doubt that this holding of the district court would be upheld by the court of appeals on remand. But the disposition of the

petition in *Grosdidier* does not require this Court to foresee the outcome of such a hypothetical remand. In determining whether to grant review of a question of law decided by a court of appeals, this Court does not undertake to determine the merits of other questions which that lower court did not resolve, or to predict which party would prevail on those issues were they to be addressed by the lower courts at some subsequent point in the litigation.

C. The Court should grant certiorari in both *Filebark* and *Grosdidier*, and consolidate those cases for briefing and argument pursuant to Rule 27.3 of this Court.

A grant of review in both cases will assure that the Court can resolve the underlying question regarding the general preclusive effect of the CSRA. The parties in these cases each advance interpretations of the CSRA which – if adopted by this Court – would be equally dispositive of the preclusion issue in both *Filebark* and *Grosdidier*. Petitioners contend that the CSRA never precludes claims regarding employment matters not specifically addressed in the CSRA; the government argues that the CSRA always has such a preclusive effect. If the permissible interpretations of the CSRA were limited to these two per se rules, the question presented would necessarily be resolved by a decision in either case. But it is possible that an amicus will propose, or that the Court itself will suggest, a view of the law under which one of these cases could be resolved on a narrower ground, without reaching the broader issue regarding the general preclusive effect of the CSRA. Should the

Court grant review in only one of the cases, and then decide it on such a narrower ground, the underlying inter-circuit conflict would remain unresolved. It would then be necessary to grant review in the second, or some other, case. The risk of the ensuing delay, and the resulting inefficient use of this Court's scarce resources, would be significantly reduced if certiorari were granted in both cases.

This Court's assessment of the question presented would be facilitated by considering that question in the context of the different types of claims presented by *Filebark* and *Grosdidier*. The substantive claim in *Grosdidier* is based on a federal statute, whereas the claims in *Filebark* rest on a collective bargaining agreement and an administrative directive. The plaintiffs in *Grosdidier* seek promotions based on asserted violations of rights in particular individual cases; the plaintiffs in *Filebark* challenge a facility classification decision that affects the salaries of a substantial group of federal workers at that facility. A grant of review in both cases would permit a fuller understanding of the practical implications of the question presented, and would allow the Court to consider whether the preclusive effect of the CSRA should turn on the types of differences presented by the two cases.

Consolidation of these cases will not entail any additional burden on the parties, because the counsel of record in *Filebark* and *Grosdidier* are the same.

CONCLUSION

For the above reasons, certiorari should be granted in No. 08-1415 and No. 08-1418, and the cases should be consolidated for briefing and argument.

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IN THE

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JOSEPH J. FILEBARK, *et al.*,
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v.

U.S. DEPARTMENT OF TRANSPORTATION and FEDERAL AVIATION ADMINISTRATION,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF THE UNIONS FOR LEAVE TO FILE, OUT OF TIME, A BRIEF *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY AND BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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IN THE

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No. 08-1415

JOSEPH J. FILEBARK, *et al.*,
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U.S. DEPARTMENT OF TRANSPORTATION and
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF THE UNIONS FOR LEAVE TO FILE, OUT OF TIME, A BRIEF *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

The National Treasury Employees Union (NTEU) and the American Federation of Government Employees, AFL-CIO (AFGE), (collectively, the Unions) hereby move this Court for leave to file, out of time, a brief *amici curiae* on behalf of neither party. Both parties have consented to the filing of an *amicus* brief, and counsel for petitioners has authorized us to represent that he does not oppose the filing out of time, without the required 10-day advance notification. The Solicitor General has not taken a position on this motion.

In support of this motion, the Unions show as follows:

1. The Rules of this Court do not specify a time for the filing of an *amicus* brief submitted before the Court's consideration of a petition for a writ of certiorari when that brief is in support of neither party. A brief *amicus curiae* in support of a respondent must be submitted within the time allowed for filing a brief in opposition. Rule 37.2(a). In the context of an *amicus curiae* brief in a case before the Court for oral argument, a brief in support of neither party must be submitted within 7 days after the time allowed for filing the petitioner's brief. Rule 37.3(a). In any event, the Rules specify that an *amicus curiae* must ensure that counsel for all parties receive notice of its intention to file an *amicus* brief at least 10 days prior to the due date. *Id.*

2. The Unions were not aware until shortly before respondents filed their brief that there was a possibility that the Solicitor General would not oppose the grant of the petition for certiorari. They were not certain of her position, and did not know the respondents' reasons for believing that this case presented an appropriate vehicle for Supreme Court review, until the response was filed on September 23, 2009. Counsel for NTEU formally notified each party on September 17, six days before the September 23 due date, that it intended to file an *amicus* brief if respondents acquiesced in the granting of certiorari. It was, however, not until September 23 that the Unions could reach a definitive conclusion regarding the need for an *amicus* brief urging the Court to deny the writ of certiorari. For this reason, the Unions were not able to give notice of their intention to file

an *amici curiae* brief at least 10 days prior to what we believe to be the filing date.

3. The Unions are filing this brief as speedily as possible. In addition, counsel for NTEU consulted with counsel for petitioners and made arrangements to provide him with a typed version of the brief by the evening of September 28, in sufficient time for him to file a reply if petitioners so choose. For that reason, counsel for petitioners has stated that he does not oppose the granting of this motion.

4. The Unions respectfully submit that their participation as *amici* on behalf of neither party would bring important information to the attention of the Court. The Unions' perspective is shared by neither party, and they make arguments not raised in either the petition or the response.

Accordingly, for these reasons, the Unions respectfully request that the Court grant them leave to file the accompanying brief *amici curiae* in support of neither party.

Respectfully submitted,

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BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

INTEREST OF THE *AMICI* [1]

1. The National Treasury Employees Union (NTEU) is a federal sector labor organization that represents the interests of approximately 150,000 employees of the federal government. It has a long history of representing its members' interests in federal court in, for example, 1) suits in the United States Court of Federal Claims or the federal district courts based on violations of money-mandating statutes and brought under the Tucker Act, 28 U.S.C. § 1491, and the Back Pay Act, 5 U.S.C. § 5596; 2) pre-enforcement challenges to illegal agency regulations or policies under the Administrative Procedure Act (APA), 5 U.S.C. § 701, *et seq.*; 3) actions for declaratory and injunctive relief involving statutes, regulations, or agency policies that violate the Constitution, brought under 28 U.S.C. § 1331; and 4) actions in district court where employees allege other statutory violations.

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[1] The parties have consented to the filing of this brief, and their letters of consent have been lodged with the Clerk. As explained in the accompanying motion, counsel received notice more than 10 days prior to the filing of this brief of the *amici*'s intent to file a brief, but they did not receive notice 10 days prior to what we believe to be the due date. No attorney for either party has authored this brief in whole or in part, and no person or other entity, other than the *amici*, made any monetary contribution to the preparation or submission of this brief.

NTEU has frequently confronted arguments that the CSRA precludes the exercise of federal court jurisdiction.[2] Indeed, NTEU was a party, or its lawyers were counsel, in many of the cases cited in the petition and response. For example, NTEU counsel litigated *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir.) (en banc), *cert. denied sub nom. Carter v. Goldberg*, 498 U.S. 811 (1990), the case interpreting 5 U.S.C. § 7121(a)(1) to bar employees covered by a negotiated grievance process from bringing an action in district court under a money-mandating statute—there, the Fair Labor Standards Act, 29 U.S.C. § 216(b). In the wake of that decision, NTEU sought congressional action to clarify the law. In 1994, Congress responded favorably by amending 5 U.S.C. § 7121(a)(1) to overturn *Carter* and to clarify that the negotiated grievance procedure is only exclusive as to other administrative remedies, not as to judicial causes of action. Thereafter, NTEU provided legal representation to a federal employee in *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002), which

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[2] *See NTEU v. Von Raab*, 649 F. Supp. 380, 384-385 (E.D. La. 1986) (rejecting claim that CSRA precludes judicial review of challenge to constitutionality of drug-testing program), *rev'd on other grounds*, 816 F.2d 170 (5th Cir. 1987), *aff'd in part, vacated in part and remanded*, 489 U.S. 656 (1989); *Bosco v. United States*, 931 F.2d 879, 882-83 (Fed. Cir. 1991), *aff'd on reh'g*, 976 F.2d 710 (Fed. Cir. 1992) (rejecting preclusion argument in suit for back pay under Prevailing Rate Act); *NTEU v. Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984) (affirming denial of motion to dismiss NTEU's pre-enforcement challenge to Office of Personnel Management regulations on grounds of CSRA preclusion); *NTEU v. Chertoff*, 385 F. Supp. 2d 1, 22-23 (D.D.C. 2005) (denying government's motion to dismiss NTEU challenge to lawfulness of regulations implementing new personnel system at the Department of Homeland Security), *aff'd in part, rev'd in part on other grounds*, 452 F.3d 839 (D.C. Cir. 2006).

held that the 1994 amendment reversed the *Carter* ruling. *Carter*, the subsequent legislative action, and the holding in *Mudge* are discussed extensively in respondents' brief at 6-7, 18-20. Most recently, NTEU participated as *amicus* in *Whitman v. Department of Transportation*, 547 U.S. 512 (2006), filing a brief addressing the breadth of preclusion under the CSRA as well as the meaning of 5 U.S.C. § 7121(a)(1), as amended (the issue on which the case was ultimately decided).

In light of its long history litigating federal employee claims and, in particular, the appropriate application of the principles of CSRA preclusion, NTEU has a strong interest in ensuring that this Court address these issues only when and if a clearly presented conflict between the circuits arises.

2. The American Federation of Government Employees, AFL-CIO (AFGE), is a labor organization representing approximately 600,000 employees of the federal government and the D.C. government. It represents the interests of those employees through legal representation, legislative advocacy, technical expertise, and informational services. In its litigation on behalf of federal employees in federal court, it has often addressed allegations that the claims of the employees are precluded by the CSRA. In light of its long-standing concern to protect the right of federal employees to seek judicial redress, it also filed an *amicus* brief in *Whitman*.

ARGUMENT

I. UNIQUE FEATURES OF THE FAA PERSONNEL SCHEME RENDER THIS CASE AN UNSUITABLE VEHICLE FOR CONSIDERING BROAD ISSUES OF CSRA PRECLUSION

A. Petitioners are air traffic controllers employed by the Federal Aviation Administration (FAA). The Department of Transportation and Related Agencies Appropriations Act for 1996, enacted Nov. 15, 1995 (DOT Act),[3] directed the FAA Administrator to develop and implement a new personnel management system through negotiations with the exclusive bargaining representative(s) of FAA employees. *See* 49 U.S.C. § 40122(a)(1). This system, designed to address the "unique demands" on the agency's workforce, was to provide "greater flexibility in the hiring, training, compensation, and location of personnel." *Id.* § 40122(g).

In developing this new system, the FAA was generally free to ignore the CSRA. Congress specified that only a few sections of Title 5 of the U.S. Code must apply to the FAA. The sections made applicable under the 2000 amendment include some provisions related to the Merit Systems Protection Board's jurisdiction and chapter 71, relating to labor-management relations. 49 U.S.C. § 40122(g)(2).

Pursuant to the DOT Act, the FAA and the National Air Traffic Controllers Association, AFL-CIO (NATCA), the exclusive representative of the air

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[3] Pub. L. No. 104-50, Sec. 347, 109 Stat. 436, 460 (1995). *See also* Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104-264, Title II, § 253, 110 Stat. 3213, 3237 (1996), amended by Pub. L. No. 106-181, Title III, §§ 307(a), 308, 114 Stat. 61, 124, 126 (2000) (codified at 49 U.S.C. § 40122).

traffic controllers, entered into negotiations over a new compensation system that would be an integral element of the agency's personnel management system. In July 1998, the FAA and NATCA reached agreement on a Position Classification Standard (PCS) to be used in determining employee compensation. Pet. App. 28a.[4] This agreement was supplemented by subsequent Memoranda of Understanding negotiated by the FAA and NATCA. Pet. App. 29a; Amended Compl. ¶ 17.

Significantly, the PCS prescribes a special Appeal Process by which an employee or facility may challenge a classification decision. Pet. App. 30a. An individual employee may initiate an appeal, but only the Facility Manager and the NATCA Facility Representative may file the appeal. Upon receipt of the appeal, a Classification Appeal Review Committee (*i.e.*, a NATCA representative and an Air Traffic Management Representative) is established. That Committee is to issue a written decision within 60 days; the decision is "binding and final, and there is no further appeal." If, however, the Committee fails to reach a mutual decision, either the NATCA or the management representative may request that the case be heard by a Classification Appeals Board. *Id.* at 30a-31a.

The FAA announced on October 1, 1998, that the negotiated pay agreement would be extended to supervisors and managers who work at FAA facilities. Pet. App. 17a n.1; 28a n.5. Thus, the appeals processes set out in the PCS are applicable to both nonbargaining unit and bargaining unit employees.

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[4] Pet. App. references are to the decisions appended to the Petitioners' Petition for a Writ of Certiorari.

B. The personnel system outlined above, with its facility classification system, is unique to the FAA. As the district court carefully explained (Pet. App. 41a), "[t]he DOT Act was intended to supplant the CSRA and permit the creation of a personnel system specifically designed for and by the FAA." Respondents gloss over the uniqueness of the FAA system and stress what they see as similarities with the CSRA system. *See, e.g.*, Resp. Br. 17. In fact, as described by the district court, the FAA system is a complete and largely self-contained scheme with only slight overlap with the CSRA. For example, the CSRA contains no counterpart affirmatively directing negotiation over pay and providing for resolution of disputes over facility classifications that form part of the pay compensation formula.[5]

The district court further elaborated on Congress' intent in providing the FAA with the discretion and flexibility to create its own personnel management system. The court found it clear that "Congress intended that resulting system to constitute the entire personnel system." *Id.* The court cited the provisions for review specified in the DOT Act with respect to certain personnel actions, as well as the significant absence of any provision in either the DOT Act or the FAA system for judicial review of "classification decisions." *Id.* at 41a-42a. Instead, it found, Congress left to the FAA's discretion how to review erroneous classification decisions—and that discretion was exercised through the negotiation of

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[5] Negotiations over pay are permitted in relatively rare circumstances under the CSRA. Only if the agency has been granted discretion to set pay, through a separate statutory provision, is the union entitled to negotiate over pay. *Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 643-45 (1990).

the administrative appeals process outlined above. *Id.* "Where Congress wanted to guarantee certain remedies, it explicitly did so." *Id.* at 41a. Where it was silent, the court reasoned that Congress intended to preclude judicial review. *Id.* "In light of Congress' clear intent, the purpose and structure of the DOT Act limits judicial review for FAA employees to those [avenues] explicitly provided in the statute and accompanying procedures." *Id.* at 43a.

As this analysis makes clear, the relevant and governing question presented by this case is whether petitioners' claims are precluded by the *DOT Act*, given the special characteristics of the FAA personnel system.[6] Indeed, the government grounded its preclusion argument below on the DOT Act, referring to the CSRA by analogy only. There is thus no need for this Court to address the question of whether the *CSRA* precludes petitioners' claims. In any event, the special features of the FAA scheme make this case *sui generis* and an inappropriate vehicle for addressing the fundamental questions raised in the petition about the scope of CSRA preclusion.

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[6] We should point out the ambiguities in the record concerning the nature of this statutory scheme that further highlight its unsuitability as a vehicle for this Court's review. There appear to be *three* dispute resolution processes that may be relevant: the special appeals process outlined in the PCS and discussed above; the grievance process set forth in the collective bargaining agreement (CBA); and a third internal agency grievance resolution procedure set forth in the FAA Personnel Management System (PMS), as described by respondents (Resp. Br. 3-4, 7-8, 17-18). It is unclear whether complaints concerning the classification system may be grieved under the negotiated grievance procedure of the CBA or whether the PCS, or even the PMS, is the *exclusive* avenue for complaints of this nature by bargaining unit and nonbargaining unit employees.

Amici are aware that this Court granted certiorari to review issues of preclusion in another case involving an FAA employee, *Whitman v. Department of Transportation*, 547 U.S. 512 (2006). There are, however, significant differences between the two cases that explain why this case does not warrant review. In *Whitman*, the petitioner alleged that the FAA had subjected him to drug-testing in a nonrandom manner, in violation of his constitutional rights; he also brought an ancillary and derivative APA claim based on an FAA statute requiring it to ensure employees are selected for testing by nondiscriminatory methods. Thus, the legal principles at issue in *Whitman* were not dependent upon the unique FAA personnel system. This case, by contrast, implicates the singular FAA personnel management system and agreements negotiated pursuant to that system.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON CSRA-PRECLUSION PRINCIPLES WARRANTING INTERVENTION BY THIS COURT

A. D.C. Circuit Precedent Does Not Broadly Preclude Review of All Federal Employee Claims

The parties premise their claim of a circuit conflict on the assertion that the D.C. Circuit broadly precludes judicial review under statutes other than the CSRA of "federal employee claims" generally. *See, e.g.*, Pet. Br. i; Resp. Br. 13-14 & n.5. This incorrect assertion ignores, among other things, that the court below explicitly recognized in its decision that federal employees could pursue claims in court that are grounded on a "source of law" that is "independent" of the CSRA. Pet. App. 7a. Thus, and in general, the parties misapprehend the D.C. Circuit's jurispru-

dence. That court precludes review only of claims grounded on the APA where the CSRA prescribes an administrative review process, as well as claims where, as dictated by *United States v. Fausto*, 484 U.S. 439, 452 (1988), Congress' intent to proscribe review is "fairly discernable" in the CSRA's scheme.

1. The enactment of the CSRA in 1978 brought to an end the courts' willingness to exercise jurisdiction under the APA over a variety of administrative actions, such as denials of promotion or leave requests, that were alleged to have been arbitrary, capricious, or an abuse of agency discretion. The D.C. Circuit explained this reversal in *Carducci v. Regan*, 714 F.2d 171, 174 n.1 (D.C. Cir. 1983). In contrast to the pre-CSRA era, the court held that it had no jurisdiction over an employee's complaint about his allegedly arbitrary reassignment, even if it was a "nonmajor personnel action" for which no relief was available under the CSRA. 714 F.2d at 174-75.

The D.C. Circuit's decision in *Carducci* foreshadowed the 1988 holding in *Fausto*, where this Court held that the language and structure of the CSRA evinced a "deliberate" decision by Congress to preclude a particular category of employees (nonveteran members of the federal excepted service) from securing direct judicial review in a particular category of cases (adverse personnel actions). 484 U.S. at 455; *see also id.* at 443-44. The Court concluded that a congressional intent to affirmatively and deliberately preclude review of the asserted claims was "fairly discernable" in the comprehensive nature of the statutory scheme. 484 U.S. at 443, 448-49, 452.

Following that reasoning, the D.C. Circuit has refused to permit judicial review, under the APA, of

certain types of employee claims. These include cases where the CSRA prescribes a route for resolution of the claim.[7] They also include various types of personnel actions covered by the CSRA that are taken against categories of employees granted limited or no rights under the CSRA, and various categories of actions (even if taken against employees covered by the CSRA) for which the court can reasonably infer that Congress intended that no judicial relief be available.[8]

2. At the same time, the D.C. Circuit recognizes the right of federal employees to file suit regarding other matters affecting their employment. For example, the D.C. Circuit has consistently sanctioned APA pre-enforcement challenges to the validity of regulations or agency policies.[9] Such challenges have withstood arguments that the claims were precluded by the CSRA. As the court explained, review of "defined employment rights" is "quite different" from "pre-enforcement judicial review of rules." *NTEU v. Devine*, 733 F.2d at 117 n.8.

Further, the D.C. Circuit has consistently acknowledged federal employees' right to bring actions under such statutes as the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the Privacy Act, 5 U.S.C.

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[7] *See, e.g., Fornaro v. James*, 416 F.3d 63 (D.C. Cir. 2005) (employees seeking higher disability benefits are required to follow route specified in CSRA for benefit determinations).

[8] *See, e.g., Graham v. Ashcroft*, 358 F.3d 931 (D.C. Cir. 2004) (holding that FBI employee may not obtain judicial review of a letter of censure where that personnel action is not covered by CSRA, even though employee is granted certain judicial rights under CSRA).

[9] *See, e.g., NTEU v. Chertoff*, 452 F.3d 839 (D.C. Cir. 2006); *NTEU v. Devine*, 733 F.2d 114 (D.C. Cir. 1984).

§ 552a. The court has never declined jurisdiction merely because the employee is seeking material that will aid him or her in pursuing an employment-related action of some sort.[10] In cases arising under the Privacy Act, for example, the court will entertain claims for damages resulting from a disclosure or destruction of information contrary to that Act.[11] It does, however, scrutinize an employee's employment-related claim to guard against artfully pled complaints that attempt to circumvent the CSRA. Thus, the court has declined jurisdiction where the litigant is seeking to obtain review of a personnel action in the guise of a Privacy Act complaint.[12]

In sum, it is a gross overstatement to claim that the D.C. Circuit holds that the CSRA precludes "all disputes related to federal employment" under statutes other than the CSRA (Pet. Br. 12) or "all employment-related claims" except for those specific instances where the CSRA itself permits judicial review (Resp. Br. 13 n.5). While the court may have occasionally used such undefined phrases as "federal employee claims," it has given no indication of any intent to sweep *all* employee claims within that

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[10] *See, e.g., Horowitz v. Peace Corps*, 428 F.3d 271 (D.C. Cir. 2005) (former Peace Corps employee sought information under FOIA that would allegedly aid him in establishing his claim of mistreatment by the Corps).

[11] *See Chambers v. Dep't of Interior*, 568 F.3d 998 (D.C. Cir. 2009) (former federal employee seeking damages for failure to timely provide performance appraisal and for failure to safeguard document from destruction).

[12] *See, e.g., Kleiman v. Dep't of Energy*, 956 F.2d 335 (D.C. Cir. 1992) (employee claiming that personnel file inaccurately reflected his job title precluded where employee was actually attacking his position classification, for which CSRA provides exclusive remedies).

rubric, regardless of the statutory basis for jurisdiction.

B. There Is No Conflict Among the Circuits Regarding CSRA Preclusion

Petitioners allege that the decision below confirms a "well-established inter-circuit conflict." Pet. Br. 10. Thus, the petitioners claim that the Sixth and Eleventh Circuits have given the CSRA "a similarly broad preclusive effect" as the D.C. Circuit (Pet. Br. 16-17), while the Federal, Tenth, Second, and Ninth Circuits have allegedly adopted a narrower ruling (*id.* at 17-26). Respondents also purport to identify a "direct conflict" among the circuits, although they assert that the D.C. Circuit is aligned with the Second, Fourth, Fifth, Sixth, Ninth and Tenth Circuits, while only the Federal and First Circuits apply what they term a "narrower" preclusion rule. Resp. Br. 13 n.5. But, as shown, the decision of the court below breaks no new ground and does not create a conflict.

1. The greatest tension is alleged to be between the D.C. Circuit and the Federal Circuit, evidently because of the large number of cases arising within the Federal Circuit under the Tucker Act, 28 U.S.C. § 1491, seeking money damages pursuant to various money-mandating statutes.

The Federal Circuit properly recognizes Tucker Act jurisdiction where a statute, regulation, or constitutional provision mandates compensation by the Federal government for damages sustained, thereby providing a substantive right to recover money damages. *See United States v. Testan*, 424 U.S. 392, 400 (1976). Various money-mandating statutes, such as the Fair Labor Standards Act, were invoked in the

cases cited by petitioners (Pet. Br. 22-23; 29-30). In each of these cases, the Court of Federal Claims (or the various district courts with jurisdiction under 28 U.S.C. § 1346(a)(2)) retains jurisdiction under the Tucker Act, notwithstanding the CSRA. As the Federal Circuit has correctly observed, a holding that the CSRA provides the exclusive avenue for relief for such claims would render these money-mandating statutes "largely, if not totally, superfluous as unenforceable." *Bosco v. United States*, 976 F.2d 710, 714 (Fed. Cir. 1992). There is no indication in the CSRA that Congress ever contemplated such as result.

The D.C. Circuit has never taken issue with the Federal Circuit's jurisdiction grounded on the Tucker Act. Indeed, as noted, the court below acknowledged the appropriateness of a Tucker Act claim in the Court of Federal Claims where there was "an independent source of law" to support the action. *See* Pet. App. 7a, citing *Mudge v. United States*, 50 Fed. Cl. 500, 502 (Fed. Cl. 2001). Hence, the court of appeals expressly declined to find fault with the Federal Circuit precedent permitting federal employee litigation of money claims asserted under such statutes as the Tucker Act or the Fair Labor Standards Act, notwithstanding the CSRA.[13]

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[13] Both petitioners and respondents cite *Worthington v. United States*, 168 F.3d 24 (Fed. Cir. 1999), and *Romero v. United States*, 38 F.3d 1204 (Fed. Cir. 1994), as evidencing a conflict with the D.C. Circuit. Pet. Br. 19-21; Resp. Br. 13 n.5. *Romero* involved refund claims by federal employees asserting that income taxes had improperly been withheld from their pay pursuant to a withholding agreement between Puerto Rico and the Treasury Department. Consistent with the D.C. Circuit's decision below, the employees relied, not on the APA as petitioners do in this case, but on an "independent source of law," namely, the Tucker Act in combination with the Back Pay

Nor have the other cited circuits put themselves in conflict with the D.C. Circuit. Respondents concede that the precedent in the Second, Ninth and Tenth Circuits is consistent with that of the D.C. Circuit, contrary to the contentions of the petitioners. *Compare* Resp. Br. 13 n.5 *with* Pet. Br. 24-26. The only case that, in respondents' view, conflicts with D.C. Circuit precedent is *Dugan v. Ramsay*, 727 F.2d 192 (1st Cir. 1984). In that case, an applicant for an administrative law judge position had brought an APA claim against the Office of Personnel Management for arbitrarily denying his application. The First Circuit declined to find his claim precluded by the CSRA, citing a reluctance to imply preclusion from congressional silence. 727 F.2d at 194-95. Because the First Circuit itself has signaled that its pre-*Fausto* decision in *Dugan* is no longer good law (*Irizarry v. United States*, 427 F.3d 76, 78 n.2 (1st Cir. 2005)), it should not form the predicate for review by this Court.

2. On the other side of the alleged split in the circuits, neither petitioners nor respondents have identified any circuit that has adopted the excessively broad preclusion rule erroneously attributed to the D.C. Circuit. Many of the cited cases merely hold

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Act. The government nonetheless argued that the employees' cause of action was precluded by the CSRA. The Federal Circuit correctly rejected the government's CSRA preclusion claims, recognizing that there was no indication that a tax refund claim fell within the contemplation of the CSRA. 38 F.3d at 1211.

Petitioners maintain that *Worthington* is "entirely inconsistent" (Pet. Br. 27) with the D.C. Circuit's preclusion analysis. But the D.C. Circuit, while noting in *dicta* doubts about the correctness of the decision, ultimately found it inapposite. *Grosdidier v. Chairman, Broad. Bd. of Governors*, 560 F.3d 495, 497 (D.C. Cir. 2009), pet. for cert. pending, No. 08-1418.

that challenges to a reassignment, a minor personnel action encompassed within the CSRA scheme, are precluded by the CSRA. *See, e.g.*, *Tiltti v. Weise*, 155 F.3d 596 (2d Cir. 1998); *Ryon v. O'Neill*, 894 F.2d 199 (6th Cir. 1990); *Weatherford v. Dole*, 763 F.2d 392 (10th Cir. 1985); *Broadway v. Block*, 694 F.2d 979 (5th Cir. 1982). The other cases cited by respondents involve challenges to similar minor personnel actions. *See Pinar v. Dole*, 747 F.2d 899 (4th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985) (letter of reprimand, 2-day suspension, termination of a temporary promotion); *Veit v. Heckler*, 746 F.2d 508 (9th Cir. 1984) (performance rating). Petitioners' remaining cases from the Eleventh Circuit involve the refusal to entertain state tort claims closely related to the employee's federal employment. *Broughton v. Courtney*, 861 F.2d 639 (11th Cir. 1988) (malicious interference with employment and conspiracy to interfere with employment); *Hendrix v. Snow*, 170 Fed. Appx. 68 (11th Cir. 2006) (state tort claims of conspiracy involving acts within supervisor's scope of employment).[14]

None of these cases stands for the proposition that the CSRA precludes review of "all employment-related claims" or otherwise suggests an intent to deny jurisdiction where there is a separate, substantive cause of action apart from the APA. Instead,

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[14] Other circuits—including the Ninth and Tenth, circuits petitioners claim are at odds with the Eleventh—have similarly held that the CSRA preempts state tort claims related to employment. *See Roth v. United States*, 952 F.2d 611, 614-16 (1st Cir. 1991); *Rollins v. Marsh*, 937 F.2d 134, 139-40 (5th Cir. 1991); *Saul v. United States*, 928 F.2d 829, 840-43 & n.23 (9th Cir. 1991); *Petrini v. Howard*, 918 F.2d 1482, 1484-85 (10th Cir. 1990).

each stands for the unremarkable proposition that the CSRA precludes review of claims that fall within its scope.

III. There Is No Disagreement Among the Circuits Regarding the Import of 5 U.S.C. § 7121(a)(1), and That Issue Is Not Properly Before This Court

A. Section 7121(a)(1) Does Not Itself Authorize Judicial Review; Rather, as Amended, It Does Not Preclude Employee Access to Courts for Judicial Redress of Statutory Rights

Respondents devote a significant percentage of their brief (Resp. Br. 6-7, 10, 18-25) to an issue that was not raised to this Court by petitioners: whether 5 U.S.C. § 7121(a)(1) specifically authorizes judicial review.[15] That issue is a total red herring, for no court has so held. Indeed, this Court in *Whitman* spelled out that section 7121(a)(1) does not confer jurisdiction (547 U.S. at 513-14), and there is no reason for that question to be revisited.

Some background regarding the evolution of section 7121(a)(1) shows the absence of merit in the government's argument about the meaning of that provision. That section requires collective bargaining agreements to provide procedures for the settlement of grievances. "Grievances," under 5 U.S.C.

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[15] Petitioners' complaint stated that this section "establishes" a federal employee's right to seek a judicial remedy for a grievance subject to negotiated procedures in a CBA. Amended Compl. ¶ 37. Nevertheless, the D.C. Circuit squarely (and correctly) rejected that contention (Pet. App. 7a), and petitioners do not reiterate it to this Court as a basis for jurisdiction.

§ 7103(a)(9), include "any matter relating to the employment of the employee" and "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation, affecting conditions of employment." Prior to its amendment in 1994, section 7121(a)(1) provided that the negotiated procedures "shall be the exclusive procedures for resolving grievances which fall within its coverage," with certain exceptions.

In *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990), the Federal Circuit, sitting en banc, held that section 7121(a)(1) unambiguously made the grievance procedure exclusive as to all other procedures, whether administrative or judicial. In so concluding, the court relied on the absence of any qualifying language confining its reach to "administrative" procedures. Based on this interpretation of section 7121(a)(1), the court dismissed for lack of jurisdiction an action brought under the Fair Labor Standards Act.

In 1994, Congress corrected the Federal Circuit's interpretation of section 7121(a)(1) by adding to it the very term whose absence dictated the result in *Carter*: the word "administrative." Act of Oct. 29, 1994, Pub. L. No. 103-424, § 9(b), 108 Stat. 4361, 4365-66 (1994). Post-amendment, section 7121(a)(1) provides that the procedures provided in a collective bargaining agreement for the settlement of grievances "shall be the exclusive *administrative* procedures for resolving grievances which fall within its scope." (Emphasis added.)

Reviewing this statutory language, the Federal Circuit in *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002), found the plain language to be clear: "while § 7121(a)(1) [as amended] limits the administrative resolution of a federal employee's grievances

to the negotiated procedures set forth in his or her [collective bargaining agreement], the text of the statute does not restrict an employee's right to seek a judicial remedy for such grievances." *Id.* at 1228. The Eleventh Circuit agreed. *ASEDAC v. Panama Canal Comm'n*, 329 F.3d 1235, 1238-41 (11th Cir. 2003).[16]

Contrary to respondents' assertions (Resp. Br. 14 n.6, 18-19), *Mudge* and *ASEDAC* do *not* hold that this section itself creates a cause of action, or a new right to judicial review. They simply hold that, as amended, it no longer precludes courts from exercising jurisdiction that exists under some other statute, merely because that claim could also have been pursued through the negotiated grievance procedure.

To be sure, *Mudge* did use some imprecise language, referring to the amended language as "establish[ing]" a right to seek a judicial remedy. *Mudge*, 308 F.3d at 1227, 1229.[17] At the same time, however, *Mudge* clearly and repeatedly stated that the critical feature of the amended language is that it no longer forecloses (or restricts or limits) judicial review. 308 F.3d at 1226, 1228, 1230, 1232. *Accord ASEDAC*, 329 F.3d at 1239 ("text of the statute does not restrict an employee's right to seek a judicial remedy for such grievances" (quotations omitted)).

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[16] The Eleventh Circuit reaffirmed its holding in subsequent proceedings on remand. *ASEDAC v. Panama Canal Comm'n*, 453 F.3d 1309, 1312 n.3 (11th Cir. 2006).

[17] The Ninth Circuit in *Whitman v. Dep't of Transportation*, 382 F.3d 938, 942 (9th Cir. 2004), focused on the imprecise language in *Mudge* regarding the "establish[ment]" of a right to judicial review. It is based on that misreading that the Ninth Circuit disagreed with the Federal and Eleventh Circuits. As noted, the Court clarified the matter in its *Whitman* decision.

That the Federal Circuit never contemplated that section 7121(a)(1) created jurisdiction for employees to sue in federal court in the first instance, as respondents assert (*e.g.*, Resp. Br. 24-25), is clearly confirmed by *Doe v. United States*, 513 F.3d 1348 (Fed. Cir. 2008). After comprehensively reviewing *Carter*, the 1994 legislative change, and *Mudge*, the Federal Circuit squarely rejected the employees' contention that section 7121(a)(1) created a basis for jurisdiction over their claims that an agency practice violated their collective bargaining agreement. The court explained that the amended section merely removed a previous barrier to assertion of jurisdiction under another statute. 513 F.3d at 1355-56.

The D.C. Circuit also understood *Mudge*'s import. The court below correctly characterized *Mudge* as "holding that the 1994 amendment signaled Congress's intent no longer to preclude all review of covered grievances." Pet. App. 5a-6a. It had no difficulty in rejecting petitioners' contention that section 7121(a)(1) *establishes* the right to judicial review. *Id.* at 6a-7a.

There is thus no split in the circuits regarding the proper interpretation of section 7121(a)(1).

B. Contrary to Respondents' Contention, the Amended Section 7121(a)(1) No Longer Precludes Judicial Review of Claims that May Be Pursued Under a Negotiated Grievance Process

Although they did not press the argument below, respondents now appear to be taking the position that the amended section 7121(a)(1) completely precludes employees subject to a negotiated grievance process from bypassing those procedures and seeking

judicial review of any sort of employment-related claim. *See, e.g.*, Resp. Br. at 22. This is the necessary import of respondents' argument (at 20-24) that the 1994 amendment of section 7121(a)(1) did not make any substantive change in the law. To respondents, the grievance process is employees' exclusive remedy, *regardless of the existence of any other cause of action*.

Respondents did not make this argument in the court of appeals. Instead, they are resurrecting arguments made to this Court in *Whitman* and answered in detail in briefs filed in that case.[18] To a large extent respondents' argument rests on a straw-man: their erroneous interpretation of the holding in *Mudge*. But, in addition, respondents would have this Court believe that Congress amended a statute for no substantive purpose other than to "clarify" existing law regarding the choice of administrative remedies available. The *Mudge* court rejected this argument with the sound observation that "there was no need for Congress to clarify § 7121(a)(1) in this fashion" because the pre-1994 statute had unambiguously made the negotiated procedure exclusive as to other administrative remedies. 308 F.3d at 1228.

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[18] *See, e.g.*, Brief for the Respondents on Writ of Certiorari at 36-44, *Whitman v. Dep't of Transportation*, 547 U.S. 512 (2006) (No. 04-1131); Reply Brief for the Petitioner at 18-20, *Whitman* (describing legislative history of amendment to section 7121(a)(1)); Brief for the National Treasury Employees Union as *Amicus Curiae* Supporting Petitioner at 11-23, *Whitman* (same; also discussing the government's policy arguments supporting its reading of that section). *See also* Barbara A. Atkin, Elaine Kaplan & Gregory O'Duden, *Wedging Open the Courthouse Doors: Federal Employee Access to Judicial Review of Constitutional and Statutory Claims*, 12 Emp. Rts. & Emp. Pol'y J. 233, 259-71 (2008).

Finally, respondents reiterate that there would be a wave of litigation if section 7121(a)(1) is interpreted as not barring litigation of "employee grievances." Resp. Br. 25. This contention is wholly without foundation. Although the section has existed in its current form for 15 years, respondents are able to point to no resulting burden.

CONCLUSION

The D.C. Circuit has not "entered a decision in conflict with the decision of another United States court of appeals on the same important matter," as specified by Rule 10 of the rules of this Court. For that reason, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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